

12-2297pr

To be argued by:
D. B. KARRON

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 12-2297



DANIEL B. KARRON,

Petitioner - Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX Volume 1 FOR THE PETITIONER - APPELLANT

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NOTE: Page Numbers are not correct and need to be hand entered because of hand insertion of PDF. Contents for ordering, not for reference. Citations into page numbers are being checked.

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CASE
DOCKET

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General Docket
Court of Appeals, 2nd Circuit

KA-2

Court of Appeals Docket #: 12-2297 **Docketed:** 06/06/2012
Nature of Suit: 2510 PRISONER PET-Sentence (2255)
Karron v. United States of America
Appeal From: SDNY (NEW YORK CITY)
Fee Status: IFP Pending in USCA

Case Type Information:

- 1) Prisoner
- 2) Federal
- 3) Section 2255

Originating Court Information:

District: 0208-1 : [11-cv-1874](#)
Trial Judge: Robert P. Patterson, Junior, U.S. District Judge
Date Filed: 02/22/2011
Date Order/Judgment:
05/04/2012

Date NOA Filed:
05/24/2012

Prior Cases:

None

Current Cases:

None

Panel Assignment: Not available

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Daniel B. Karron,

Petitioner - Appellant,

v.

United States of America,




















Respondent - Appellee.

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06/05/2012	 11	DISTRICT COURT RECORD ON APPEAL, FILED.[635416] [12-2297]
	11 pg, 1.08 MB	
06/05/2012	 13	MOTION, for certificate of appealability, to proceed in forma pauperis, on behalf of Appellant Daniel B. Karron, FILED. Service date 06/05/2012 by US mail.[635481] [12-2297]
	13 pg, 552.11 KB	
06/06/2012	 1	NOTICE OF PRISONER APPEAL, with district court docket, on behalf of Appellant Daniel B. Karron, FILED. [630174] [12-2297]
	37 pg, 438.12 KB	
06/06/2012	 2	DISTRICT COURT OPINION, dated 05/04/2012, RECEIVED.[630189] [12-2297]
	17 pg, 73.42 KB	
06/06/2012	 4	INSTRUCTIONAL FORMS, to Pro Se litigant, SENT.[630193] [12-2297]
	2 pg, 49.13 KB	
06/06/2012	 5	MOTION, to proceed in forma pauperis, on behalf of Appellant Daniel B. Karron, FILED. Service date 06/06/2012 by US mail.[630205] [12-2297]
	9 pg, 273.71 KB	
06/06/2012	 6	DEFECTIVE DOCUMENT, MOTION, to proceed in forma pauperis, [5] , on behalf of Appellant Daniel B. Karron, FILED.[630210] [12-2297]
	2 pg, 56.56 KB	
06/06/2012	 9	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee United States of America, FILED. Service date 06/06/2012 by CM/ECF. [630329] [12-2297]
	1 pg, 65.93 KB	
06/11/2012	 10	ATTORNEY, Chi Tsun Steve Kwok for United States of America, in case 12-2297 , [9] , ADDED.[633065] [12-2297]
06/13/2012	 14	DEFECTIVE DOCUMENT,MOTION, for certificate of appealability, to proceed in forma pauperis, [13] , [13] , on behalf of Appellant Daniel B. Karron, FILED.[635486] [12-2297]
	2 pg, 56.85 KB	
06/13/2012	 16	AMENDED DISTRICT COURT OPINION AND ORDER, dated 05/04/2012, RECEIVED.[635674] [12-2297]
	17 pg, 73.7 KB	
06/26/2012	 17	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE FORM, on behalf of Party Daniel B. Karron, FILED. No service.[650624] [12-2297]
06/26/2012	 18	FORM D-P, on behalf of Appellant Daniel B. Karron, FILED. No service.[650629] [12-2297]
06/26/2012	 19	DEFECTIVE DOCUMENT, Acknowledgment and Notice of Appearance, [17] , on behalf of Appellant Daniel B. Karron, notice to pro se Appellant with form, FILED.[650636] [12-2297]
	2 pg, 64.73 KB	
06/26/2012	 20	DEFECTIVE DOCUMENT, Form D-P, [18] , on behalf of Appellant Daniel B. Karron, notice sent to pro se Appellant with form, FILED.[650642] [12-2297]
	2 pg, 64.91 KB	
07/03/2012	 24	CERTIFICATE OF SERVICE for Acknowledgment Form, Form D-P, on behalf of Appellant Daniel B. Karron, FILED. Service date 06/22/2012 by email, US mail.[661908] [12-2297]
	2 pg, 69.81 KB	
07/12/2012	 22	MOTION, to extend time to file Certificate of Appealability and In Forma Pauperis, on behalf of Appellant Daniel B. Karron, FILED. Service date 06/22/2012 by US mail, email.[661902] [12-2297]
	6 pg, 283.49 KB	
07/12/2012	 25	CURED DEFECTIVE: Acknowledgment Form, Form D-P, [20] , [19] , on behalf of Appellant Daniel B. Karron, FILED.[661922] [12-2297]
07/13/2012	 29	MOTION ORDER, granting motion to extend time [22] filed by Appellant Daniel B. Karron, by RR, copy to pro se appellant Daniel B. Karron, FILED. [663415][29] [12-2297]
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DISTRICT COURT
AMENDED
OPINION
AND ORDER
BEING APPEALED

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

DANIEL B. KARRON,

Petitioner,

07 Cr. 541 (RPP)
11 Civ. 1874 (RPP)

**AMENDED
OPINION AND ORDER**

- v. -

UNITED STATES OF AMERICA,

Respondent.

-----X

ROBERT P. PATTERSON, JR. U.S.D.J.

On March 22, 2011, Petitioner Daniel B. Karron (“Karron” or “Petitioner”), pro se, filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct her sentence arising from her conviction at trial on a one count indictment, charging a violation of 18 U.S.C. § 666. Petitioner seeks to vacate her sentence on the grounds that (1) she received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution; (2) the Government failed to disclose exculpatory evidence prior to trial in violation of Brady v. Maryland, 373 U.S. 83 (1963); and (3) she is actually innocent based on newly discovered evidence.

I. Procedural History

On May 21, 2008, the Government filed a one count superseding indictment (“Indictment”) against Petitioner, charging her with intentionally and knowingly misapplying more than \$5,000 of federal funds owned by and under the care, custody, and control of Computer Aided Surgery, Inc. (“CASI”), a company at which Petitioner was the owner, President and Chief Technical Officer, (Trial Transcript (“Tr.”) at 107, 253, 624, 963), and that CASI received more than \$10,000 in federal funds during a one-year period, in violation of 18

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U.S.C. § 666. After a ten-day jury trial ending on June 11, 2008, the jury convicted Karron of the single count in the Indictment. On October 27, 2008, Karron was sentenced to seven and one-half months home-confinement, followed by seven and one-half months imprisonment, followed by three years of supervised release, as well as \$125,000 in restitution. (Amended Sentencing Judgment, Oct. 31, 2008, ECF No. 71.) On October 29, 2008, Karron appealed from her judgment of conviction and on October 7, 2009, the Second Circuit affirmed the judgment of this Court. United States v. Karron, 348 Fed. App'x. 632 (2d Cir. 2009). On January 4, 2010, Karron filed a petition for certiorari in the United States Supreme Court, which was denied on February 22, 2010. Karron v. United States, 130 S. Ct. 1555 (2010).

Karron filed this § 2255 motion on February 22, 2011, and submitted a revised accompanying memorandum of law on April 28, 2011. (Petitioner's Revised and Resubmitted Mem. to Accompany Mot. to Vacate Criminal Verdict ("Pet'r Mem.")) On July 16, 2011, the Government filed a memorandum in opposition to Karron's § 2255 motion. (Gov't Mem. in Opp. to Def.'s Mot. ("Gov't Mem.")) Karron filed a "corrected sur-reply" memorandum on December 2, 2011. (Corrected Sur-Reply Memorandum of Fact and Law ("Reply").) The Government filed its response to Karron's "corrected sur-reply" on February 1, 2012. (Gov't Resp. to Def.'s Corrected Sur-Reply in Supp. of the § 2255 Mot. ("Gov't Resp."))

II. Background

In October 2001, CASI received a federal grant of \$2 million, under the Advanced Technology Program ("ATP"), to be disbursed over the course of three years, designed to support high-risk scientific research (the "Grant"). (Gov't Ex.'s 11, 13; Tr. at 56.) The National Institute of Science and Technology ("NIST"), the U.S. Department of Commerce agency that administered the Grant, required grant recipients to follow spending-related "rules and

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regulations,” including adherence to a NIST-approved budget (a detailed budget narrative that spelled out the amount of money to be spent in each budget category) and a general prohibition on using federal funds to pay for items or services not included within the approved budget without written approval. (Tr. at 87, 265.) In addition, the Grant’s funding “principles,” included: (1) a prohibition on paying for “indirect costs,” i.e. overhead expenses that did not relate to the research and (2) a prohibition on reimbursement for “sunk costs,” i.e. costs incurred before the start of the Grant period. (Id. at 88, 298.)

Bettijoyce Lide (“Lide”), a NIST employee responsible for supervising the Grant, and Hope Snowden (“Snowden”), a NIST employee responsible for reviewing CASI’s budget submissions, each testified to advising Petitioner, both prior to and during the administration of the Grant, about the rules of adhering to the budget and the need for prior written approval for any change in budgeted expenses of over ten percent or changes in key personnel, the rule against expenditure of Grant funds for “indirect costs,” and the rule against disbursement of Grant funds for “sunk costs.” (Id. at 88-89, 108-09, 257-59.) Despite repeated warnings from the NIST officials (Lide and Snowden) who administered the Grant, (id. at 122-23, 259), as well as several warnings to Petitioner from fellow CASI employees, (id. at 637-38, 840-42, 978-79), Petitioner used the money received from the ATP to pay pre-Grant rent as well as utilities, home renovation expenses, restaurant meals, and miscellaneous household items during the Grant period, in violation of the Grant’s funding principles outlined above. (Gov’t Ex.’s 101, 110, 114, 115). At trial, the Government presented testimony and evidence that it was Karron, the sole signatory on CASI’s bank accounts, (Tr. at 299-302), who misapplied the Grant funds (id. at 638-39).

In addition, Belinda Riley (“Riley”), an auditor for the U.S. Department of Commerce,

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Office of the Inspector General (“OIG”), who analyzed CASI’s financial records, was called by the Government as an expert in accounting and auditing procedures to facilitate the jury’s review of the financial records submitted into evidence. (Id. at 462, 464-65.) In May and June of 2003, Riley conducted a preliminary audit of CASI at the request of NIST to “determine the financial status of the grant project.” (Id. at 466; Gov’t Ex. 60; Tr. at 140-42.) Riley based her audit on documents (i.e. ledgers, records, and books) provided by CASI, (Tr. at 468-69, 518; Gov’t Ex. 60 at 2), and filed a final audit report with the OIG on August 25, 2004 (Gov’t Ex. 62; Tr. at 516). Riley also created a database covering the time period from the Grant’s start date on October 1, 2001 to June 2003 (Gov’t Exs. 110, 111), based on CASI’s bank account records at J.P. Morgan Chase Bank (“Chase Bank”) (Gov’t Ex. 81), American Express credit card statements for CASI (Gov’t Ex. 90), and bank account records at Chase Bank for Petitioner (Gov’t Ex. 80). Regarding her analysis, Riley testified that, with a few small exceptions, the Grant was CASI’s only source of funding, (Tr. at 548-49), that CASI’s bank and credit card accounts were used by Petitioner for disallowable expenses, i.e. rent, cleaning services, and miscellaneous household items for CASI, (id. at 533, 537-38, 544, 555-58; see Gov’t Exs. 110, 114), and that over an eighteen-month period, Karron misapplied approximately \$465,000 (Tr. at 552-55). Based on Riley’s preliminary audit NIST suspended CASI’s Grant on June 27, 2003 – eighteen months after it was initially funded. (Tr. at 149-50; Gov’t Ex. 26 at 6.)

Testimony and exhibits at trial also showed that Karron’s misapplication of the Grant funds was intentionally and knowingly made. In July 2002, Frank Spring (“Spring”), a bookkeeper, testified that he was hired by CASI to assist on preparing the books for the ATP audit at the end of the Grant’s first year. (Id. at 835.) Spring testified that he was asked by Petitioner to use Quicken, a bookkeeping software program, to examine Petitioner’s personal

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financial records going as far back as April 2001 (six months prior to the Grant's October 1, 2001 start date) and to charge certain expenses from those records to the Grant. (Id. at 837-38.) Spring also testified that he had a series of conversations with Petitioner after he noticed that certain non-Grant-related expenses were improperly included as Grant expenses in CASI's books and records. (Id. at 840-42.) Petitioner scolded Spring for not knowing what he was doing and told him that she was "in conversation with the [Grant] managers in Washington to ensure that these expenses . . . would be allowed." (Id. at 840-42.) With respect to Karron's use of Grant funds for the rent payments for her midtown Manhattan apartment,¹ CASI's bank records at Chase Bank showed that Petitioner drew a total of thirty checks, payable to herself, for \$2,000 each, (Gov't Ex.'s 81, 110; Tr. at 530, 533); the checks contained notations designating each as monthly rent payments, eighteen of which contained notations designating them as back rent for months prior to the Grant's October 1, 2001 start date (Gov't Ex. 81; Tr. at 755-57). Spring also testified that Karron told him that she intended to "tell the ATP managers that [s]he lived in Connecticut" with a friend, despite the fact that she was living in the Manhattan apartment. (Tr. at 854-55.) In an e-mail dated December 18, 2002, Karron told a friend: "I will make a lease with Windy [Farnsworth in Connecticut] and make like I only keep a folding bed on 33rd Street [Karron's midtown Manhattan apartment]. If ATP buys into this idea, then I can charge my rent on the apartment to the grant and pay my mortgage." (Gov't Ex. 213.) Farnsworth testified that Karron never lived with her in Connecticut. (Tr. at 1187.)

CASI's former business managers, Lee Gurfein (2001-2002) and Robert Benedict (2003), also testified that despite their repeated warnings, Petitioner continued to use Grant funds to pay for non-Grant-related expenses without written approval from NIST. (Id. at 643, 981-82.)

¹ Karron owned the apartment located at 300 East 33rd Street, Unit 4N, New York, NY, (see Endorsed Letter, Apr. 3, 2008, ECF No. 36), which became CASI's office address (see Def.'s Ex. F; see also Tr. at 533).

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Benedict further testified that he and Spring reported Karron's conduct to CASI's Board of Directors, which then deprived Karron of her CASI checkbook. (Id. at 978-79.) Karron circumvented the restriction by using PayPal, an online service that allows the user to pay bills by credit card. (Id. at 979-80.)

III. Legal Standard

Section 2255 of Title 28 of the United States Code provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255. "[P]risoners seeking habeas relief must not only prove that constitutional violations occurred at trial, but also that such errors caused substantial prejudice or a fundamental miscarriage of justice." Ciak v. United States, 59 F.3d 296, 301 (2d Cir. 1995).

Karron is proceeding pro se, and thus the submissions will be "liberally construed in [her] favor," Simmons v. Abruzzo, 49 F.3d 83, 87 (2d Cir. 1995) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972), and read "to raise the strongest arguments that they suggest," Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996) (internal citation omitted). See also Green v. United States, 260 F.3d 78, 83 (2d Cir. 2001).

IV. Discussion

A. Ineffective Assistance of Counsel

Karron claims that her counsel was ineffective for several reasons. First, Petitioner argues that counsel adopted a flawed defense strategy by arguing that Petitioner lacked criminal intent. (Id. at 86, 88, 106.) Second, she argues that counsel failed to "confront" an uncalled

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witness, Joan Hayes (“Hayes”), whom Petitioner asserts was “hostile” to her. (Pet’r Mem. at 95; Reply at 18-19.) Third, she argues that counsel failed to suppress Government Exhibit 114. (Pet’r Mem. at 95, 106; Reply at 17-18.) Fourth, she alleges – without citing to any evidentiary support – that her counsel failed to prepare adequately for trial until four days before trial, when he had received an additional court-mandated retainer from the sale of Petitioner’s apartment. (Pet’r Mem. at 84-85.) Finally, Petitioner argues that counsel’s computer illiteracy rendered him “unreasonable” for a defense which involved the financial records and other “data” on Petitioner’s computer. (*Id.* at 86.) In opposition, the Government contends that “Karron fails to establish that her trial counsel’s conduct was unreasonable or that she suffered any prejudice from such conduct.” (Gov’t Mem. at 13-14.)

1. Ineffective Assistance of Counsel Standard

a. Deficient Performance

To establish a claim for ineffective assistance of counsel, a petitioner must demonstrate that “counsel’s performance was deficient,” and that counsel’s “deficient performance prejudiced the petitioner.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls “below an objective standard of reasonableness” under “prevailing professional norms.” *Id.* at 688. “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment.” *Id.* at 690. Counsel’s conduct is also presumed to fall within “the wide range of reasonable professional assistance, bearing in mind that there are countless ways to provide effective assistance in any given case.” *United States v. Aguirre*, 912 F.2d 555, 560 (2d. Cir. 1990) (internal citation omitted).

b. Prejudice to Petitioner

The deficiency in counsel’s performance must also have had an effect on the result; the

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error must have been prejudicial to the petitioner. Strickland, 466 U.S. at 691-96. Prejudice to the petitioner is demonstrated by “showing that counsel’s errors were so serious as to deprive the defendant of a fair trial,” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 687, 694. A reasonable probability exists when confidence in the outcome is undermined. Mayo v. Henderson, 13 F.3d 528, 534 (2d Cir. 1994). A showing that counsel’s errors had “some conceivable effect” on the result is insufficient. Strickland, 466 U.S. at 693.

2. Petitioner’s Ineffective Assistance of Counsel Arguments

a. Counsel Failed to Utilize Forensic Accounting Analysis

Petitioner contends that counsel employed a flawed strategy by arguing that Petitioner lacked the requisite criminal intent to commit the crime charged. Petitioner argues that her counsel’s decision to pursue this defense strategy was improper in light of United States v. Urlacher, 979 F.2d 935, 938 (2d Cir. 1992), which held that to violate 18 U.S.C. § 666, a defendant need not have an intent to defraud the Government. Petitioner misrepresents the holding of Urlacher. While a violation of 18 U.S.C. § 666 does not require an intent to defraud the Government, it does require an intent to misapply government funds for otherwise legitimate purposes. See Urlacher, 979 F.2d at 938 (emphasis added). Instead, Petitioner asserts that counsel should have pursued a defense theory that the “funds considered misappropriated were in fact property of Karron and did not belong to the government.” (Pet’r Mem. at 25.) In this vein, Petitioner argues that her counsel failed to “provide and convincingly argue a forensic foundation upon which to trace ownership of the funds used to pay for indirect or unallowable payments.” (Id.) Specifically, Petitioner alleges that counsel failed to utilize forensic analysis of

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“accounting experts [Melvin] Spitz² and [Deborah] Dunlevy³ because of conflicts over counsel and accounting fees.” (*Id.* at 26.) Petitioner argues that this analysis would have provided the jury with an “alternate theory of Karron’s spending” and “brought key forensic points to the attention of the Court and Jury that would have resulted in an innocent verdict.” (*Id.* at 90-91.) Petitioner states that Dunlevy “had prepared extensive forensic exhibits and analysis of CASI spending and Karron funding, that Counsel refused [to] pay for and pay attention to.” (*Id.* at 91.)

In support of this assertion, Petitioner provides excerpts from the Declaration of Deborah Dunlevy (“Dunlevy Decl.”) dated August 23, 2010. (*United States v. Karron*, 08 Civ. 10223, ECF No. 32; Reply, Ex. D.) In this Declaration, which was initially submitted by Petitioner in the Government’s civil case against her to recover damages under the False Claims Act, *see United States v. Karron*, 750 F. Supp. 2d 480 (S.D.N.Y. 2011), Dunlevy states that it contains a “comprehensive forensic reconstruction” of CASI’s records by Dunlevy. (Dunlevy Decl. at 3 ¶ 1.) The timestamps, however, on Dunlevy’s computer generated charts and graphs show that Dunlevy’s reconstruction was printed in July and August of 2010. (Dunlevy Decl. Parts 2-20.) Petitioner provides no affidavits containing any factual support that her counsel had access to this analysis prior to, or during her criminal trial in June of 2008.

Furthermore, the trial minutes reveal that Petitioner’s counsel’s decision to not call the forensic accounting experts was sound. His examination of Riley cast considerable doubt as to

² Melvin Spitz is a C.P.A. who was hired by CASI in 2003. (*United States v. Daniel Karron*, 07 Cr 541, ECF No. 46 at 2.) Petitioner’s counsel notified the Court that Spitz may be called as an expert to testify about the discrepancies “between his accounting results performed for CASI with the accounting results achieved by Belinda Riley.” (*Id.*) Counsel, however, did not call Spitz to testify.

³ Deborah Dunlevy was a bookkeeper hired to perform accounting services for CASI sometime in 2004. (Dunlevy Decl. at 2 ¶ 6.) She assisted Petitioner’s counsel during Petitioner’s trial and was present in the courtroom. (Tr. at 1163.) The trial record shows that Petitioner’s counsel attempted to call Dunlevy to the stand as an expert witness to authenticate Petitioner’s MasterCard records, (Tr. at 1174), however, the Court denied counsel’s request due to late notice of expert testimony. (Tr. at 1173.) Ultimately, the parties stipulated that the credit card records were in fact Petitioner’s personal credit card records, and thus Dunlevy’s expert testimony became moot. (Tr. at 1176.)

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her expertise as an accountant due to her handling of the CASI audit. For example, Petitioner's counsel was able to attack Riley on (1) how she calculated salary and loans with respect to both Petitioner and other CASI employees (Tr. at 606-618, 710-732, 788-807), (2) whether meals were in fact allowable expenditures (Tr. at 769-778), (3) whether rent may have been negotiated to be an "indirect cost" in an audit resolution (Tr. at 746), and (4) why Petitioner was denied the right to a post-audit resolution to challenge the unallowable expenditures (Tr. at 809-810).

Had counsel called defense experts Spitz or Dunlevy as witnesses in his case, he would have opened them up to cross-examination about CASI's bank and credit card expenditures under the ATP Grant. These expenditures, which were for unallowable purposes under the Grant, and in excess of \$5,000, were made willfully and knowingly in clear violation of 18 U.S.C. § 666. For example, the evidence showed that Petitioner drew a total of thirty checks from the CASI bank account, payable to herself, for \$2,000 each (*id.*; Tr. at 530, 533-34), containing notations designating each as rent payments, eighteen of which contained notations designating them as back rent for months prior to the Grant's October 1, 2001 start date (Gov't Ex. 81; Tr. at 755-57). Therefore, counsel's decision to attack Riley's expert testimony and Government Exhibit 114 by cross-examination of Riley, in lieu of calling Dunlevy or Spitz, was a reasonable legal trial strategy in light of the circumstances. *See Cuevas v. Henderson*, 801 F.2d 586, 590 (2d Cir. 1986) (courts should not "second guess matters of trial strategy simply because the chosen strategy was not successful) (quoting *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983)).

b. Counsel Failed to Impeach The Government's "Key Witness"

Petitioner next argues that her counsel was ineffective because he did not impeach the Government's "key witness," former CASI employee Joan Hayes, who Petitioner characterizes

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as hostile to her. (Reply at 18.) Additionally, Petitioner argues that counsel failed to object to the admittance of Government Exhibit 114 into evidence and/or “confront issues” with respect to that exhibit. (Reply at 17; Pet’r Mem. at 95.) These arguments are also without merit. As an initial matter, the Government did not call Hayes to testify and had no obligation to do so. Therefore, Petitioner’s trial counsel would have had to call Hayes as her own witness and take the chance that the Court would allow cross-examination of her as an adverse witness based on her demeanor on the witness stand. Instead, counsel elected to illicit from other witnesses that Hayes, as CASI’s accountant, Petitioner’s personal accountant and CASI’s independent auditor, was “wearing multiple hats,” (Tr. at 887, 903, 1014-15, 1040-41), and as such, counsel attempted to persuade the jury that Hayes may have improperly kept CASI’s books and records on which Riley’s audit relied. Secondly, trial counsel had no reason to call Hayes as she only worked for Petitioner during a portion of the Grant period in which the expenditures were made. (Tr. at Since Hayes left CASI’s employ before the Grant was terminated, she could not testify to any curative steps Petitioner may have taken to rectify any missteps, nor could she confirm that any changes Petitioner made to the CASI’s budget were in final form. Thus, the decision to not call Hayes was reasonable under the circumstances confronting Petitioner’s trial counsel.

c. Counsel’s Preparation For Trial

Petitioner argues that her counsel was inadequately prepared for trial because of his alleged refusal to “do any preparation on this case until he was paid,” and due to his alleged computer illiteracy (Pet’r Mem. at 84.) First, Petitioner’s characterization of her counsel’s pre-trial conduct is inconsistent with Court minutes and counsel’s correspondence with the Court which document counsel’s efforts well before his receipt of his full retainer and the trial’s June 2, 2008 start date. (See Letter to Judge Patterson Regarding Request for Additional Discovery dated

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Aug. 8, 2007, Gov't Mem. Ex. A; Order to Retrieve and Copy Certain Files Stored on Electronic Storage Devices, ECF No. 16; Letter to Compel 404(b) Evidence dated May 12, 2008, ECF No. 38.) Second, failure to pay legal fees or counsel's motion to withdraw for his client's failure to pay, without more, does not give rise to a conflict of interest of the type which would establish ineffective assistance. United States v. O'Neil, 118 F.3d 65, 71-72 (2d Cir. 1997). Third, Karron's allegations regarding her counsel's technological literacy is insufficient to amount to ineffective assistance where counsel's conduct during trial showed he was well-prepared to question the Government's witnesses and advance his defense theory.

B. Petitioner's Brady Claims

1. Procedural Default

Petitioner also claims that the Government failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). As an initial matter, Petitioner's trial counsel was not her appellate counsel and Petitioner's appellate counsel failed to raise these claims on direct appeal. Therefore, Petitioner is procedurally barred from raising these claims in the instant motion. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice or that he is actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998) (internal quotations and citations omitted); Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993) (cause "must be something external to the petitioner, something that cannot be fairly attributed to him." (quoting Coleman v. Thompson, 501 U.S. 722, 753 (1991)) (emphasis in original)). There is no record of Petitioner raising her Brady claims on direct appeal to the Second Circuit, nor has Petitioner indicated that any external factors prevented her from raising those claims on direct appeal.

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2. Petitioner's Claim of Exculpatory Documents

Nonetheless, Petitioner's Brady claims are without merit. Petitioner merely asserts that Government Exhibit 114 provides implicit evidence that NIST approved his budget reclassifications through alleged inconsistencies in that exhibit. (Pet'r Mem. at 36.) Similarly, Petitioner argues that "evidence . . . must exist to support the reclassification." (Id. at 66 (emphasis added).) Petitioner, however, points to nothing in Exhibit 114 or any other exhibit to support her highly speculative assertion that exculpatory documents must exist, nor does she provide affidavits containing any factual support for this allegation. Mere speculation is not sufficient to support a claim for a Brady violation. See, e.g., Ferguson v. Walker, No. 00 Civ. 1356 (LTS), 2002 WL 31246533 at *13 (S.D.N.Y. Oct. 7, 2002); Harris v. United States, 9 F. Supp. 2d 246, 275 (S.D.N.Y. 1998). Furthermore, the Department of Commerce OIG's review of the Grant file yielded no exculpatory evidence.⁴ (Declaration of SA Rachel Ondrik dated July 15, 2011 ("Ondrik Decl.") ¶ 3.)

Petitioner argues that Snowden destroyed correspondence with Petitioner which was exculpatory in nature. (Reply at 3.) Specifically, Petitioner points to portions of the trial transcript where Snowden admits to discarding financial status reports. (Tr. at 420.) A review of the transcript reveals that Snowden testified that she received these reports and notified Petitioner that she had submitted "inconsistent and inaccurate" financial status reports, which Petitioner would then correct and resubmit. (Tr. at 419.) Snowden testified that she would "put this [inaccurate report] in the file, make a note to it, and then when a new [corrected,

⁴ The Government found no exculpatory evidence that provides any support for Petitioner's claim that NIST approved of her alleged budget reclassifications. (Gov't Mem. at 22.) Moreover, the Government "offered defense counsel the opportunity to inspect the original copies of all documents in the Government's possession, custody, or control," including the complete Grant file, but counsel never availed himself of that opportunity. (Gov't Mem., Ex. A at 1-2.)

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resubmitted] form came in . . . just discard the old form and put in the correct form.” (Id. at 420.)

Thus, nothing in the record suggests, nor does Petitioner provide any affidavits containing factual support ,that Snowden destroyed exculpatory evidence.

3. Petitioner’s Claim of OIG Agent Intimidation

Lastly, Petitioner argues that OIG agents intimidated and coerced witnesses into not testifying at trial. (Pet’r Mem. at 71, 73.) Petitioner contends that these witnesses would have provided exculpatory evidence were it not for the agent’s improper actions. (Id.) Once again, Petitioner does not provide any factual support for her allegations of improper conduct. Her speculative accusations are not supported by affidavits from any of the non-testifying witnesses who were allegedly intimidated by OIG agents. SA Rachel Ondrik submitted an affidavit stating that none of the witnesses interviewed were coerced, threatened, intimidated or persuaded into not testifying at trial. (Ondrik Decl. ¶¶ 4-5.) Petitioner’s only support for her allegation is an affidavit submitted three years after her trial by Lee H. Goldberg, a character witness who in fact testified at trial, who states that during his interview on October 25, 2004 he felt intimidated by OIG agents because he believed the agents “to be in a hands-ready stance that would allow them to quickly draw weapons.” (Aff. of Lee H. Goldberg dated Sept. 12, 2011, Reply Ex. G ¶ 4.) Since Mr. Goldberg testified at trial, he was clearly not intimidated by the alleged actions of the agents.

In sum, Petitioner’s arguments are entirely speculative and unsubstantiated. Accordingly, Petitioner’s Brady claims are without merit.

C. Actual Innocence

A Petitioner can bypass the procedural bar of failing to raise claims on direct appeal if he can demonstrate “actual innocence.” Bousley, 523 U.S. at 623. “To establish actual innocence,

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petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” Schlup v. Delo, 513 U.S. 298, 327-328 (1995) (internal quotations omitted). For an actual innocence claim to prevail, a petitioner must present “new reliable evidence . . . that was not presented at trial.” Id. at 324. Petitioner does not point to any new evidence which would demonstrate actual innocence. Petitioner merely points to Dunlevy’s accounting reconstruction discussed supra, (See Reply at 26-27), from which reconstruction Dunlevy concludes that she “has not found any evidence of fraud” (Id. Ex. D ¶11). Petitioner’s remaining arguments all revolve around purported, but unspecified, discrepancies she claims exist in Government Exhibit 114. (Id. at 27-30.) In light of the evidence that the Government presented at trial, even were the Court to accept such “discrepancies” as new evidence, Petitioner’s arguments do not meet the standard, that “it is more likely than not that no reasonable juror would have convicted [Petitioner].” Schlup, 513 U.S. at 327. Petitioner’s actual innocence claim is therefore without merit.

V. Conclusion

For the reasons set forth above, Petitioner’s motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255 is denied. No hearing is necessary, as “the motion and the files and records of the case conclusively show that the [Petitioner] is entitled to no relief.” 28 U.S.C. § 2255; Armienti v. United States, 234 F.3d 820, 822-23 (2d Cir. 2000).

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962). As the Petitioner makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253.

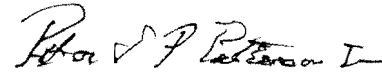
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IT IS SO ORDERED.

Dated: New York, New York
May 4, 2012

A handwritten signature in cursive script, appearing to read "Robert P. Patterson, Jr.", written over a horizontal line.

Robert P. Patterson, Jr.
U.S.D.J.

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Copies of this order were faxed to:

Counsel for Defendant:
Daniel B. Karron
348 East Fulton Street
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PRO SE

Counsel for the U.S.A.
Christian R. Everdell
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One St. Andrew's Plaza
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CASE
DOCKETED
BRIEFS

ORIGINATING
2255
FORM
MOTION

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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT

SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District Southern District of New York (SDNY)	
Name (under which you were convicted): Daniel B. Karron		Docket or Case No.: 07 CR 00541-01 (RPP)	
Place of Confinement: Probation, Eastern District of New York, FPC Alderson, WV		Prisoner No.: 60101-054	
UNITED STATES OF AMERICA		Movant (include name under which you were convicted)	
v.		DANIEL B. KARRON	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: United States District Court, Southern District of New York, 500 Pearl Street, New York, NY 10007

(b) Criminal docket or case number (if you know): 07 CR 00541-01 (RPP)

2. (a) Date of the judgment of conviction (if you know): June 11, 2008 (verdict)

(b) Date of sentencing: October 27, 1008 (Sentencing Amended)

3. Length of sentence: 15 Months; 7.5 Months Incarceration, 7.5 Months Home Confinement, 3 Years F

4. Nature of crime (all counts): 18 U.S.C. 6 6 6 Misapplying Grant Funds

5. (a) What was your plea? (Check one)

(1) Not guilty ☒ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? not applicable

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☒ Judge only ☐

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7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:

- (a) Name of court: Second Circuit Court of Appeals
- (b) Docket or case number (if you know): 08-5287-cr
- (c) Result: Judgment of the district court AFFIRMED by detailed order of the court without opinion
- (d) Date of result (if you know): October 7, 2010
- (e) Citation to the case (if you know): United States of America -against- Daniel B. Karron
- (f) Grounds raised: _____

1. Whether an intent to defraud is an element of the offense of misapplication of funds under 18 U.S.C. § 666(a)(1)(A); and

2. Whether 18 U.S.C. § 666 is unconstitutionally vague.

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): No. 09-847

(2) Result: Denied petition for writ of certiorari

(3) Date of result (if you know): SCOTUS Docket Feb 22, 2010, Docketed Feb 24, 2010 Second

(4) Citation to the case (if you know): Daniel B. Karron, Petitioner v. United States

(5) Grounds raised: In a prosecution for misapplication of funds under 18 U.S.C. § 666(a)(1)(A), must the government prove that the defendant converted those funds for personal use, or the use of a third party, and acted with an intent to defraud or deprive the
rightful owner of the same?

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

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(4) Nature of the proceeding: _____
(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐
(7) Result: _____
(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:
(1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Date of filing (if you know): _____
(4) Nature of the proceeding: _____
(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☒
(7) Result: _____
(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?
(1) First petition: Yes ☐ No ☒
(2) Second petition: Yes ☐ No ☒

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(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Funds considered misappropriated were in fact property of Karron
and did not belong to the government

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Personal Earned Salary, budgeted, advanced and tax paid, are personal property of Karron. These were
the funds used by Karron to pay project overhead and personal costs. Evidence consists of (but not

limited to) approved budgeted salary line, contemporaneous signed time sheets, signed paychecks,
withholding shown on paychecks, withholding tax transmittal checks and forms (state and federal),

quarterly withholding tax returns (State and Federal), and journal entries on CASI books and
adjustments on withholding tax returns made in subsequent quarters. Finally, the rent paid by CASI,

using after tax Karron funds, forwarded to CASI, written on CASI general corporate funds and drawn on

CASI corporate checks, payable to Karron, were reclassified as Salary by the government in its own
exhibit Ex 114. Karron was convicted mainly if not exclusively by Exhibit 114 but analysis of the numbers

did not reveal this fact until after the trial and was not part of any appeal.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Appeals attorneys were constrained
by the lack of forensic evidence and analysis by the two forensic expert witnesses standing by for
the trial. Issues in ineffective assistance of defense counsel vis-a-vis failure of defense to mount
forensic accounting defense detailed below.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

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Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND TWO: The grant funds were not spent beyond the statutory flexibility limits

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The total spending was within the acceptable statutory and ATP variation limits of plus and minus 10% between any budget categories.The main basis for Grounds two is that the base for the percentage variation must necessary and logically be the grant budget, not solely the government's funded amount, but the first year budgetincluding co-funding and all direct costs and indirect costs. On that full the grant is within budget. If the change basis is the federal share advanced to date only, then most would be out of budget in thebeginning, when the percentage basis is small and as the change base expanded, would gradually fall within budget as total spending accumulated.

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(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: n/aName and location of the court where the motion or petition was filed: n/aDocket or case number (if you know): n/aDate of the court's decision: n/aResult (attach a copy of the court's opinion or order, if available): n/a

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND THREE: Conviction foundation laid on erroneous, misleading, and false data causing plain error

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The foundation of the Defendant's conviction rested on GX110 and GX114. GX114 does not add up, and appears to be made up. Hints of this were acknowledged by the trial judge, but the full extent was

not known until after conviction with a comprehensive forensic accounting by Dunlevy, admitted into evidence in the collateral civil attack cited in the attached Memorandum of Fact and Law..

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

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Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: Ineffective Assistance of Defense Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The defense counsel asked to be relieved of the case just prior to the start of the case for insufficient funding. The Defendants only significant asset, Karron's apartment was liened, and every computer, hard drive and laptop in the apartment were seized in a prior raid, without regard to the ownership of the equipment or its source (grant or personal funds). Because of that, the Karron had to pay 30,000 to a government computer forensic data recovery company to recover Karron's own business records and

defense data from Karron's own computers.

Karron had to build new computers to house and reconstruct the 10 terabytes of disk images from the Karron's company computer RAID (Redundant Arrays of Independent Disks). Defense counsel applied to be relieved from the case because of lack of sufficient payment. Karron's apartment was sold to fund data recovery, but the proceeds were insufficient to pay both the data recovery and the requested fee for counsel.

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Counsel did not engage the two forensic accounting experts brought in to audit and review the grant, did not challenge lack of tracing of funds requirement, and did not present alternative spending theory to counter Exhibit 114.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Appeals attorneys were selected by counsel, and they choose to attack the law rather than facts. When asked why in private conversations, both young attorneys stated they got too much work from defense counsel to go up against him in public and risk damaging their main referrer.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
(a) At preliminary hearing: Ronald Rubinstein, Esq

(b) At arraignment and plea: Ronald Rubinstein, Esq

(c) At trial: Ronald Rubinstein, Esq

(d) At sentencing: Ronald Rubinstein, Esq

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(e) On appeal: Ronald Rubinstein, Esq, Laura Oppenheim, Esq, Marshall Mintz, Esq

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

FILED
FEB 22 2011
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion. * This motion is timely and is not time bar-red.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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Therefore, movant asks that the Court grant the following relief: Vacate Conviction

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

IN FORMA PAUPERIS DECLARATION
See attached I.F.P. Declaration

[Insert appropriate court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FILED
FEB 22 2011
CLERK OF COURT

ORIGINATING BRIEF

MEMORANDUM OF
FACTS and LAW

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US DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL B. KARRON

Petitioner,

-v.-

UNITED STATES OF AMERICA

Respondent.

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07-cr - 541 (RPP)

Revised and Resubmitted
Memorandum of Facts and
Law to accompany 28 USC
§2255 Motion to Vacate
Criminal Verdict

1 Introduction

The Petitioner, DANIEL B. KARRON, responding pro se at this time, respectfully resubmits the this substantially revised Memorandum of Fact and Law, and Declarations of Dunlevy, Karron, and Eisen, in support of the Petitioners' 28 USC §2255 motion.

New evidence that, viewed in light of the evidence as a whole, is sufficient to establish that no reasonable factfinder would have found the movant guilty of the offense . 28 USC §2255 (h)(1) . These facts were not available during the trial due to:

- Ineffective assistance of the defense counselor Ronald Rubenstein under the Strickland v. Washington, 466 US 668 (1984) two prong test and subsequent standards and
- Withholding of exculpatory evidence by the Prosecution, in violation of Supreme Courts' Brady v. Maryland, 373 US 83 (1963) ruling.

The Defendant respectfully moves the Court to vacate or set aside the Defendant's conviction as unlawful and unconstitutional.

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3 Jurisdiction

The Defendant, Dr. Karron, was convicted in a Jury trial of misappropriation of more than \$5,000 in federal funds on June 11, 2008, and sentenced to 15 months split custodial sentence and 3 years' probation on October 20, 2008. The Defendant is currently under supervision by the court probation service, until August 21, 2012, the third anniversary from her release from prison into supervision. A direct appeal to the second circuit has been concluded and the Supreme Court of the US was denied certiorari on Feb 22, 2010. The Defendant therefore may file this "collateral" post-conviction challenge to her conviction under 28 USC §2255.

(18) The great writ

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the US, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. 28 USC §2255

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The US Constitution specifically includes the habeas procedure in the Suspension Clause(Clause 2), located in Article One, Section 9. The writ of *habeas corpus ad subjiciendum*¹ is a civil, not criminal, ex parte proceeding in which a court inquires as to the legitimacy of a prisoner's custody. habeas corpus collateral review, codified as 28 USC §2255 is a longstanding tradition in American criminal justice, an important legal instrument safeguarding individual freedom against arbitrary government action. It is a separate quasi-civil proceeding, filed with the original trial court, and is not a continuation of the “direct” appellate review process. The §2255 motion is the post-conviction tool after the exhaustion of direct appeals. The §2255 motion is an important tool to rectify injustices that were not or could not have been raised on direct appeal. This is because it gives courts broad discretion in fashioning appropriate relief, including dismissal of all charges. One of the most significant differences between a direct appeal and a §2255 motion is that direct appeals are constrained to be decided on the district court record as it exists as of the time the notice of appeal is filed. In contrast, §2255 motions offer the Defendant the opportunity to present the court with new evidence.

4 Review Standards

(1) *Pro se* pleadings

As per the Supreme Court in Haines v. Kerner, 404 US 519, 30 L Ed 2d 652, 92 S. Ct 594 (1972), *pro se* pleadings are to be construed and held to a less stringent standard than formal pleadings drafted by lawyers. If the Court can reasonably read pleadings to state a valid claim on which litigant can prevail, it should do so despite failure to cite proper legal authority, confusing legal theories poor syntax, and sentence structure, or litigant's unfamiliarity with pleading requirements.

Petitioner Karron respectfully urges this Honorable Court to grant all and the most liberal considerations with respect to this 28 USC §2255 petition. Karron is not an attorney, but is proceeding *pro se*, to safeguard Karrons' Constitutional rights and in the best interests of lawful justice.

¹ “you should have the body for submitting”

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(2) Model Rules of Professional Conduct**(1) Standards for Ineffective Assistance of Counsel**

The standards for Ineffective Assistance of Counsel are based on the Sixth Amendment of the Constitution of the US of America. Further, Strickland v. Washington, 466 US 668 (1984) and subsequent relevant case law provide a foundation. The American Bar Association Model Rules of Professional Conduct, 2009 Edition, Rule 1.1 *et seq* as applicable provide an objective professional standard for conduct of Defense Counsel during the course of the Defendants' trial.

(2) Criteria for Ineffective Assistance of Counsel under Strickland Standard

Counsel's performance at trial are evaluated the two-prong test described in Strickland v. Washington, 466 US 668(1984). Under *Strickland*, the court must first ask whether counsel's representation "fell below an objective standard of reasonableness." *Id at 687-88*. The court must then ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id at 694*.

1) Errors so serious

Deficient performance is rendered when counsel makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.at 687*. When assessing claims of deficient performance, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id at 689* "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.at 688* The court evaluation must question, "whether counsel's assistance was reasonable considering all the circumstances." *Id* To establish deficient performance, it is not enough for the Petitioner to show that his attorney's strategy was merely wrong, or his actions unsuccessful; he must demonstrate that the actions his attorney took were "completely unreasonable".²³

Held: An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under §2255, whether or not the petitioner could have raised the claim on direct appeal. ... A §2255 motion

² *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997) (quotation omitted).

³ STRICKLAND V. WASHINGTON, 466 US 668 (1984)

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is preferable to direct appeal for deciding an ineffective-assistance claim. A defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial⁴⁵⁶

(3) II. Standard of Review for IAF Claims

Under 28 USC §2255, a prisoner in federal custody may attack his sentence on four grounds:

- that the sentence was imposed in violation of the Constitution or the laws of the US,
- that the court was without jurisdiction to impose the sentence,
- that the sentence was in excess of the maximum authorized by law, or
- that the sentence is otherwise subject to collateral attack. 28 USC §2255;⁷

To prevail under §2255, the movant bears the burden of proof by a preponderance of the evidence.⁸

Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" ⁹The existence of cause for a procedural default must turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel.¹⁰¹¹

2) Example IAC claims

- fails to move to suppress evidence,
- conduct an adequate investigation,
- raise legal issues at trial,
- introduce exculpatory evidence

⁴ *ibid*

⁵ *MASSARO V. US* (01-1559) 538 US 500 (2003),.

⁶ *Williams v. Taylor*, 529 US 362 - Supreme Court (2000)

⁷ *Hill v. US*, 368 US 424, 426-27 (1962)

⁸ *Miller v. US*, 261 F.2d 546, 547 (4th Cir. 1958)

⁹ *US v. Sanders*, 247 F.3d 139, 144 (4th Cir. 2001) (quoting *Bousley v. US*, 523 US 614, 622 (1998).

¹⁰ *US v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999).

¹¹ *Adrian Subido, Petitioner, v. US OF AMERICA* US District Court, E.D. Virginia, (2005)

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(3) Brady v Maryland Issues

The review standard for Brady v. Maryland, 373 US 83 (1963) rules violation claims are as promulgated by the Supreme Court and subsequent relevant case law.

(1) Brady v Maryland Rule Background

Brady v. Maryland, 373 US 83(1963) requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. The court said “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”¹². Subsequent Supreme Court decisions¹³ have held that the government has a constitutionally mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant’s right a fair trial under the Fifth and Fourteenth Amendments’ Due Process Clauses.¹⁴. These include

- (1) impeachment evidence¹⁵
- (2) favorable evidence in the absence of a request by the accused¹⁶
- (3) evidence in the possession of persons or organizations (e.g., the police)¹⁷

1. Justice be done

In Brady v. Maryland, 373 US 83 (1963) The Court cited as justification for the disclosure obligation of prosecutors “the special role played by the American prosecutor in the search for truth in criminal trials.”¹⁸ The prosecutor serves as “the representative . . . of a

¹²373 US at 87

¹³Treatment of Brady v. Maryland Material in US District and State Courts’ Rules, Orders, and Policies Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the US Laural L. Hooper, Jennifer E. Marsh, and Brian Yeh. Federal Judicial Center October 2004. [http://www.fjc.gov/public/pdf.nsf/lookup/bradymat.pdf/\\$file/bradymat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradymat.pdf/$file/bradymat.pdf)

¹⁴US v. Bagley, 473 US 667, 675 (1985) (“The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”)

¹⁵Giglio v. US, 405 US 150, 153–54 (1972)

¹⁶US v. Agurs, 427 US 97, 107 (1976)

¹⁷Kyles v. Whitley, 514 US 419, 437 (1995)

¹⁸Strickler v. Greene, 527 US 263, 281 (1999)

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sovereignty whose interest . . . in a criminal prosecution is not that it shall win a case¹⁹, but . . . that justice shall be done.”²⁰

2. Standard of Materiality

The *Brady* decision did not define what types of evidence are considered “material” to guilt or punishment, but other decisions (below) have. For example, the “standard of materiality” for undisclosed evidence that would constitute a *Brady* violation has evolved over time from

- “if the omitted evidence creates a reasonable doubt that did not otherwise exist,”²¹ to
- “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,”²² to
- “whether in [the undisclosed evidence’s] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence,”²³ to the current standard,
- “when prejudice to the accused ensues . . . [and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.”²⁴

(2) Brady Violations in the Second Circuit: result-affecting

The Supreme Court in *Brady* ruled “the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment.”²⁵ The Second Circuit noted that while the Supreme Court appeared to be using the word “material” in its evidentiary context—to refer to evidence that has some probative value—subsequent Supreme Court ruling have changed its meaning. “Material” evidence for purposes of disclosure under *Brady* recently has been more narrowly defined to apply to evidence that, if suppressed, would undermine confidence in the outcome of the trial.²⁶ The Supreme Court have held that the government violates its obligation under *Brady* where it has suppressed evidence that “could reasonably [have been] taken to put the whole case in such a

¹⁹ Findley, Keith A., Tunnel Vision (May 11, 2010). CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH, B. Cutler, ed., APA Press, 2010 ; Univ. of Wisconsin Legal Studies Research Paper No. 1116. Available at SSRN: <http://ssrn.com/abstract=1604658>

²⁰ *Kyles v. Whitley*, 514 US 419, 439 (1995) (quoting *Berger v. US*, 295 US 78, 88 (1935))

²¹ *US v. Agurs*, 427 US 97, 112 (1976)

²² *Bagley*, 473 US at 682.

²³ *Kyles*, 514 US at 434

²⁴ *Strickler*, 527 US at 281–82.

²⁵ *Brady*, 373 US at 87.

²⁶ 267 F.3d at 141 (discussing line of Supreme Court authority following *Brady*).

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different light as to undermine confidence in the verdict.”²⁷ The government has an absolute duty of disclosure for “result-affecting” evidence. This is evidence have a reasonable probability that the suppression of a particular piece of evidence would change the outcome of the trial.²⁸

(3) Brady Violations in the setting of a weak case

In civil litigation, the fact that a litigant has purposely withheld or destroyed key evidence gives rise to the inference that the litigant knows his case is weak and knows his cause will not prevail if the adverse evidence is presented at trial. This “consciousness of a weak case” inference falls under the broad umbrella of relevant circumstantial evidence. Applied in the context of intentional *Brady* violations, the defendant is entitled to show that the prosecutor was conscious of the weakness of the government’s case and purposely withheld evidence that bolstered the defense or undermined the government’s case. In a criminal case in which the government always has the burden of proof, the “consciousness of a weak case” inference signals to the jury that the government’s case is compromised. This can provide the jury with reasonable doubt. Just as criminal courts have traditionally allowed the government to prove the defendant’s consciousness of guilt with evidence that the defendant attempted to suppress or destroy incriminating evidence, the government’s intentional *Brady* misconduct is likewise admissible to prove the prosecutor’s “consciousness of a weak case.”

(4) consciousness of a weak case

Intentional *Brady* misconduct falls within the scope of the “consciousness of a weak case” inference. Given that the government always has the burden of proof in a criminal case, evidence that the government’s case is weak is relevant to whether the government can prove guilt beyond a reasonable doubt. *Brady* misconduct evidence also meets all other requirements for admissibility under the rules of evidence. As such, the blanket exclusion of this evidence could infringe upon the defendant’s constitutional right to present a defense.²⁹

(5) Nonproduction of a witness

The nature of the pressure upon litigants to produce the best evidence is most intense in Criminal proceedings, and nowhere is the balance of resources more skewed. The so-called

²⁷ 267 F.3d at 139 (quoting *Kyles v. Whitley*, 514 US 419, 435 (1995))

²⁸ *Id.* at 14

²⁹ CYNTHIA E. JONES (2010) A REASON TO DOUBT: THE SUPPRESSION OF EVIDENCE AND THE INFERENCE OF INNOCENCE THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 100, No. 2

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"best evidence rule" affirmatively requires production of the most cogent proof of the contents of a centrally significant writing. This rule may be stated thus:

to prove the terms of a writing, the original writing itself is regarded as the primary evidence, and secondary evidence is inadmissible unless failure to introduce the original is satisfactorily explained.³⁰

This is generally, however, the only instance in which the pressure is in the nature of an exclusionary rule.' The pressure takes the form of criminal penalty in some instances.' In other situations the pressure is only persuasive. A plaintiff seeking to prove the making of an advance of money to a defendant may rely on his own testimony; the testimony of a disinterested onlooker or eavesdropper; proof of an admission by a defendant; proof of a regular business entry; or any combination thereof, together with other evidence. Similarly, in a murder case, the prosecutor may rely on eye-witness testimony; a dying declaration of the alleged victim; a confession; circumstantial evidence; or some combination of these or different proofs. The pressure in these cases to make the proponent's side strong and clear lies in the risk that a natural suspicion-sharpened by the adverse comment of astute opposing counsel-may arise from failure to adduce the most cogent proof the trier believes, or is led to believe, should be available if the proponent's contentions as to the facts are sound.

3. The "Pressure Rules" as related to Best Evidence Rule

A long time ago, in 1846, Mr. Justice Nelson discussed the "pressure rules" as follows:

One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary [written] evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and the inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted, which, from the nature of the case, supposes **still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party...**³¹

When it is apparent that more direct and explicit proof was within the power of the party to produce, "the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and . . . it may well be presumed [that a] more perfect exposition . . . would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."³²

³⁰ James E. Beaver (1978) Nonproduction of Witnesses as Deliberative Evidence. University of Puget Sound Law Review Vol. 1 Page 221

³¹ Clifton v. US, 45 US (4 How.) 242, 247-48 (1846). ". Cases also using the term "presumption" include, e.g., Graves v. US, 150 US 118, 121 (1893); Keifer v. State, 204 Ind. 454, 462, 184 N.E. 557, 560 (1933) ("raises only a presumption of fact"); Lee v. State, 156 Ind. 541, 60 N.E. 299 (1901) (presumption of fact); Doty v. State, 7 Blackf. 427 (Ind. 1845).. See also Runkle v. Burnham, 153 US 216, 225-26 (1894) (White, J.).11. Lamin v. McTighe, 72 Wash. 2d 587, 593, 434 P.2d 565, 569

³² Id. at 248

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Ultimately, when a litigant who is in possession of what would appear to be a strong element of evidence declines to produce it, the possessor's intention must be questioned:

"The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."³³

(6) Conviction Mentality

The prosecutor's "conviction mentality," is increasingly recognized by specialists in cognitive psychology that a prosecutor's predisposition probably is to ignore *Brady*. A cognitive bias of prosecutors reveals they routinely make professional decisions based on their personal beliefs, values, and incentives, and that these decisions may result in the subversion of justice, even unintentionally.³⁴ These studies have examined the capacity of prosecutors to maintain their neutrality and objectivity that compliance with *Brady* requires, and have described the kinds of pressures and biases that operate on virtually all of the discretionary decisions that prosecutors make, including the ability to maintain an open mind that *Brady*-compliance requires.³⁵

(7) Tunnel Vision, confirmation bias, selective information processing, belief perseverance, avoidance of cognitive dissonance

The prosecutor who is convinced of a defendant's guilt exhibit a so-called "tunnel vision" whereby ignores, overlooks, or dismisses evidence that might be favorable to a defendant as being irrelevant, incredible, or unreliable.³⁶ Other cognitive biases that operate on a prosecutor's decision-making process include

- "confirmation bias" that credits evidence that confirms one's theory of guilt, and discounts evidence that disconfirms that theory;³⁷

³³ *Interstate Circuit, Inc. v. US*, 306 US 208 (1939) at 226

³⁴ Keith A. Findley & Michael S. Scott, (2006) *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291, 296-307 (case studies in tunnel vision by prosecutors that subverted justice).

³⁵ Alafair S. Burke (2006) *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (describing prosecutorial decision-making as often "irrational" because of cognitive biases)

³⁶ Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006); Findley & Scott, *supra* note 115.

³⁷ Burke, *supra* note 14, at 1594-96.

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- “selective information processing,” that inclines one to weigh evidence that supports one’s belief in the defendant’s guilt more heavily than evidence that contradicts those beliefs;³⁸
- “belief perseverance,” that describes a tendency to adhere to one’s chosen theory even though new evidence comes to light that completely undercuts that theory’s evidentiary basis;³⁹ and
- “Avoidance of cognitive dissonance,” where a person tends to adjust his or her beliefs to conform to their behavior.⁴⁰

All of these biases are impediments to rational decision making and make it understandable that a zealous prosecutor, will seek to win a conviction, and overestimate the strength of his case. They will underestimate the probative value of evidence that contradicts or undermines their case. Evidence that contradicts or undermines the prosecutors’ case is precisely the kind of evidence that a prosecutor is required to identify and disclose under *Brady*.

(4) Federal Rule of Criminal Procedure Rule 16

Federal Rule of Criminal Procedure Rule 16 governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly said that in revising Rule 16 “to give greater discovery to both the prosecution and the defense,” The committee explained, “the requirement that the government disclose documents and tangible objects ‘material to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.” Rule 16 entitles the defendant to receive, upon request, the following information [amongst others not salient in this case]

- Documents and tangible objects within the government’s possession that “are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant”;
- Reports of examinations and tests that are material to the preparation of the defense; and
- Written summaries of expert testimony that the government intends to use during its case in chief at trial.

³⁸ Id. at 1596-99

³⁹ Id. at 1599-1602

⁴⁰ Id. at 1601-02.

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Rule 16 also imposes on the government a continuing duty to disclose additional evidence or material subject to discovery under the rule, if the government discovers such information prior to or during the trial. Finally, Rule 16 grants the court discretion to issue sanctions or other orders “as are just” in the event the government fails to comply with a discovery request made under the rule.

(8) ABA Model rules for Prosecutorial Conduct Rule 3.8

Finally, the ABA Model rules for Prosecutorial Conduct Rule 3.8 also provide a foundational objective standard for evaluation of conduct during this trial.

(5) Actual Innocence

Argument grounds of Actual Innocence are the most difficult to make, and depend on newly discovered, or newly presented forensic exculpatory evidence that only need to raise a reasonable doubt of guilt where previously there was no reasonable doubt of guilt.

(9) 18 USC 2255

The standard of review is based directly on application of 18 USC 2255 *vis*:

(b) ...determine the issues and make findings of fact and conclusions of law with respect thereto.

“judgment vulnerable to collateral attack” “or is otherwise subject to collateral attack” or

(h)(1) (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense” ...

(10) New and Suppressed forensic evidence

The standard of Actual Innocence is based on the revelation of new or suppressed forensic evidence. Because the prosecution must prove guilt beyond a reasonable doubt, a defendant asserting actual innocence need only raise a reasonable doubt as to whether they were the person who committed a particular crime, or whether the acts that they committed amount to the commission of a crime.⁴¹

⁴¹ Jim Dwyer, Peter J. Neufeld, Barry Scheck (2000) Actual innocence: five days to execution and other dispatches from the wrongly convicted.

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(11) Frameup

Actual Innocence can be the result of “Frameup”⁴²⁴³ - the where the Defendant shows that the falsification of evidence has resulted in the creation of a meritless case by persons of authority with access to the primary evidence, or by private parties hoping to profit from the defendant's misfortune.

(12) Schlup v Delo Actual Innocence Gateway

The “actual innocence” opens a “gateway” that the petitioner may pass through to have their claims heard on the merits under the “fundamental miscarriage of justice” doctrine in

Schlup v. Delo, 513 US 298 (1995). In *Schlup*, the Court held that a petitioner who wishes to qualify for relief under the doctrine must bring forth new evidence and establish that “it is more likely than not that no reasonable juror would have convicted him” in light of the new evidence. If a petitioner meets this high burden, he may overcome procedural barriers that would otherwise bar his path and have a federal court consider his *habeas* petition on the merits. *Schlup* allows cases to be reopened in light of new evidence.

3) Newly Discovered vs. Newly Presented

In Wright v. Quarterman, 470 F. 3d 581 - 5th Circuit (2006), the Fifth Circuit identified the split among the courts of appeals as to whether the *Schlup* standard “requires ‘newly discovered’ evidence or merely ‘newly presented’ evidence.” The Eighth Circuit’s position is that the new evidence claimed by the petitioner must not have been available at trial and “could not have been discovered earlier through the exercise of due diligence.” Osborne v. Purkett, 411 F. 3d 911 - 8th Circuit (2005)

(13) House v Bell DNA and Other Evidence

In *House v. Bell*, 547 US 518 (2006) the Supreme Court found that House’s arguments based on new DNA and other evidence were sufficient to meet the *Schlup* standard. Forensic

⁴² Criminal Law By Thomas J. Gardner, Terry M. Anderson. 10th Edition 2009

⁴³ A frameup (caused by a person of authority) or setup (caused by a person not in authority) is an American term referring to the act of framing someone, that is, providing false evidence or false testimony in order to falsely prove someone guilty of a crime. It is possibly derived from the word frame, meaning to cause someone innocent to appear guilty by “putting the person in a picture frame of suspicion”.

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evidence that becomes available post-conviction can prevail in a Habeas petition where “it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.”

(14) Co-Funding

Co-Funding is supplying of funds from two different sources. ATP Projects are all co-funded. The funds are deposited into a single account, from which program costs are paid.

(15) Co-Mingling of Funds

Commingling literally means "mixing together". Used in a legal context it is a breach of trust in which a fiduciary mixes funds that he holds in the care of a client with his own funds, making it difficult to determine which funds belong to the fiduciary and which belong to the client.⁴⁴

(16) Tracing of Funds

Tracing is a legal process by which a claimant demonstrates what has happened to his/her property and identifies its proceed.⁴⁵

(17) Fungibility of Funds

Fungibility is the property of a good or a commodity whose individual units are capable of mutual substitution. It is interchangeability with other assets of the same type. Assets possessing this property simplify exchange, as fungibility values all goods of that class as the same. Fungible means being of such nature or kind as to be freely exchangeable or replaceable, in whole or in part, for another of like nature or kind.

(18) Rule of Lenity

Rule of Lenity is used in construing an ambiguous statute. Under this rule, the court resolved the ambiguity in favor of the defendant.⁴⁶ The spirit of the rule of lenity – fundamental

⁴⁴ <http://en.wikipedia.org/wiki/Commingling>

⁴⁵ [http://en.wikipedia.org/wiki/Tracing_\(law\)](http://en.wikipedia.org/wiki/Tracing_(law))

⁴⁶ McNally v. US, 483 US 350 (1987);
Muscarello v. US, 524 US 125 (1998) (declining to apply the rule of lenity);

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fairness – lies at the heart the criminal justice system.⁴⁷ At a high level of generality, all agree that ambiguous criminal statutes must be construed in favor of the accused. However, the rule of lenity is often not taken seriously. Supreme Court itself has articulated two plainly conflicting standards. In one formulation, the Court has stated that “where text, structure, and history fail to establish that the Government’s position is unambiguously correct[,]” a court must “apply the rule of lenity and resolve the ambiguity in [defendant’s] favor.”⁴⁸ In another formulation, the Court has held that a statute must contain a “‘grievous ambiguity or uncertainty’” before the rule of lenity may be applied.⁴⁹

On collateral review, the District Court ruled that, under intervening Circuit precedent interpreting the word “proceeds” in the federal money-laundering statute, §1956(a)(1)(A)(i) applies only to transactions involving criminal profits, not criminal receipts. Finding no evidence that the transactions on which respondents’ money-laundering convictions were based involved lottery profits, the court vacated those convictions.⁵⁰

(a) The rule of lenity dictates adoption of the “profits” reading. The statute nowhere defines “proceeds.” An undefined term is generally given its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 US 179. However, dictionaries and the Federal Criminal Code sometimes define “proceeds” to mean “receipts” and sometimes “profits.” Moreover, the many provisions in the federal money-laundering statute that use the word “proceeds” make sense under either definition. The rule of lenity therefore requires the statute to be interpreted in favor of defendants, and the “profits” definition of “proceeds” is always more defendant-friendly than the “receipts” definition. Pp. 3–6.⁵¹

Justice White wrote the opinion of the Court, holding that the federal mail fraud statute only protected money and property, not the public’s intangible right to honest government:

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.⁵²

Evans v. US, 504 US 255 (1992) (Thomas, J., dissenting);

Scarborough v. US, 431 US 563 (1977) (Stewart, J., dissenting)

⁴⁷ *McBoyle v. US*, 283 US 25, 27 (1931) (the principle of “fair warning” motivates the lenity rule) (Holmes, J.).

⁴⁸ *US v. Granderson*, 511 US 39, 54 (1994)

⁴⁹ *Muscarello v. US*, 524 US 125, 138-29 (1998) (quoting *Staples v. US*, 511 US 600, 619, n. 17 (1994))

⁵⁰ *US v. Santos* (2008).

⁵¹ *Ibid.* Justice Scalia, joined by Justice Souter, Justice Thomas, and Justice Ginsburg, concluded in Parts I–III and V that the term “proceeds” in §1956(a)(1) means “profits,” not “receipts.” Pp. 3–14, 16–17.

⁵² *McNally v. US*, 483 US 350 (1987)

KA-61**KA-61****KA-61****(19) American Institute of CPA Code of Professional Conduct and**

The behavior of the two accountants is governed by the AICAP Code of Professional Conduct.

(20) Independence of Auditor

Independence of Auditors governs behavior relating to the audit work. Organization and the individual auditor, whether government or public, should be free both in from personal, external, fact and appearance and organizational impairments to independence.⁵⁴

(21) Contra-account

In double entry or fund accounting systems, an account, a contra-account which offsets another account. A contra-asset account has a credit balance and offsets the debit balance of the corresponding asset. This is required to maintain a balance between debits and credits in the bookkeeping process. In this case, a purchase is debit by a Budget Line Item, and its source of funding is credit to NIST ATP or CASI/Karron

(22) Completeness in an audit

Completeness Assertions about completeness deal with whether all affecting transactions and accounts that should be in the financial statements are included. Overall objective of an Audit is to provide an opinion as to whether the financial statements are fairly resented in accordance with accounting standards. Objectives include:

- Completeness (no unrecorded transactions, assets or liabilities)
- Accuracy (transactions and balances are accurate)

(23) Whitehouse Office of Management and Budget (OMB) OMB Cost Principles

⁵³ The case was superseded one year later when the US Congress amended the law to specifically include honest services fraud in the mail and wire fraud statutes, but that statute would itself be struck down in 2010 as being too vague, reinstating the holding in this case.

⁵⁴ GAGAS Amendment 3

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NIST ATP grants management staff can be evaluated based on their understanding granting of audit resolution allowances and allocations based on OMB and DOC standards at the time.

(24) Other OMB Documents Circulars regarding Auditor Independence

The copying of audit information is clearly a violation of Auditor Independence standards.

(25) Applicable Department of Commerce general rules and regulations

See Appendix

(26) NIST ATP specific statutes.

See Appendix

(6) *Mens Rea* Standards

Model Penal Code defines discussion of the different modes of culpability.

- 4) Purposefully: the actor has the "conscious object" of engaging in conduct and believes or hopes that the attendant circumstances exist.
- 5) Knowingly: the actor is practically certain that his conduct will lead to the result.
- 6) Recklessly: the actor is aware that the attendant circumstances exist, but nevertheless engages in the conduct that a "law-abiding person" would have refrained from.
- 7) Negligently: the actor is unaware of the attendant circumstances and the consequences of his conduct, but a "reasonable person" would have been aware.
- 8) Strict liability: the actor engaged in conduct and his mental state is irrelevant.

a. Subjective and objective tests

The test for the existence of *mens rea* may be:

- (a) subjective, where the court must be satisfied that the accused actually had the requisite mental element present in his or her mind at the relevant time (for purposely, knowingly, recklessly etc) (see concurrency);
- (b) objective, where the requisite *mens rea* element is imputed to the accused, on the basis that a reasonable person would have had the mental element in the same circumstances (for negligence); or
- (c) hybrid, where the test is both subjective and objective.

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The court will have little difficulty in establishing mens rea if there is actual evidence – for instance, if the accused made an admissible admission. This would satisfy a subjective test. But a significant proportion of those accused of crimes make no such admissions. Hence, some degree of objectivity must be brought to bear as the basis upon which to impute the necessary component(s). It is always reasonable to assume that people of ordinary intelligence are aware of their physical surroundings and of the ordinary laws of cause and effect. Thus, when a person plans what to do and what not to do, he will understand the range of likely outcomes from given behavior on a sliding scale from "inevitable" to "probable" to "possible" to "improbable". The more an outcome shades towards the "inevitable" end of the scale, the more likely it is that the accused both foresaw and desired it, and, therefore, the safer it is to impute intention. If there is clear subjective evidence that the accused did not have foresight, but a reasonable person would have, the hybrid test may find criminal negligence. In terms of the burden of proof, the requirement is that a jury must have a high degree of certainty before convicting, defined as "beyond a reasonable doubt".

9) "an evil-meaning mind with an evil-doing hand."

In this classic case the defendant, a part time scrap metal dealer, entered an air force bombing range, from which he collected spent bomb casings. These casings had been lying around for years. The defendant sold the casings at a junk market, earning a profit of \$84. For this, the defendant was charged with violating 18 USC §641 which made it a crime to "knowingly convert" government property. The defendant conceded he had done the act. His sole defense was that he believed that the casings were abandoned property, and therefore there was no crime in taking them.[1]

After the trial, the trial judge instructed the jury with regard to the law, rejecting the defense. Thus, the jury was permitted to find the defendant guilty solely on the basis of his having taken government property. They need not have found, and were not entitled to consider, any belief he may have had with respect to the abandonment of the bomb casings - that is, whether it was government property (which is clearly defined by the plain language of the statute as a crime), or abandoned property (which is not a crime). Were this reading of the statute correct, Congress would have created a strict liability crime.

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The Court of Appeals affirmed the decision of the lower court. However, the Supreme Court, reversed the decision of the trial court, concluding that the defendant must be proven to have had knowledge of the facts that made the conversion wrongful, that is that the property had not been abandoned by its owner. Justice Robert Jackson, writing for a unanimous Court, emphasized the importance of individual criminal intent (*mens rea*) in the Anglo-American legal tradition, stating famously that crime was "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand."⁵⁵

4. Concurrence

In Western jurisprudence, concurrence (also contemporaneity or simultaneity) is the apparent need to prove the simultaneous occurrence of both *actus reus* ("guilty action") and *mens rea* ("guilty mind"), to constitute a crime; except in crimes of strict liability. In theory, if the *actus reus* does not hold concurrence in point of time with the *mens rea* then no crime has been committed.

5 Grounds

(1) Ground One: (IAC/Actual) Funds considered misappropriated were in fact property of Karron and did not belong to the government.

Defense Counsel Rubinstein provided Ineffective Assistance of Counsel (IAC) in failing to provide and convincingly argue a forensic foundation upon which to trace ownership of funds used to pay for indirect or unallowable payments. The full IAC argument is developed under Grounds Four, *below*.

5. Reasonable Doubt

The focus in Ground One is to raise **reasonable doubt** as to the ownership of funds. Further, we prove that the Defendant's payment of rent was reclassified as Salary/Wages by NIST ATP. There must be additional documentation in support of this evidence⁵⁶. This

⁵⁵ *Morrisette v. US*, 342 US 246 (1952).

⁵⁶ Trial Transcript Page 155 : Lide – cross, RUBINSTEIN Questioning, Lide Answering

15 Q. And how voluminous would you say that project file is?

16 A. In the Advanced Technology Program secure site where its

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exculpatory documentation was not provided to the Defense the Prosecution at trial when it should have been.

(27) NIST ATP project was co-funding from Karron Wages, In-Kind, etc.

b. Defense failed to engage forensic accounting support

The Defense counsel failed to engage the proffered forensic accounting experts Spitz and Dunlevy because of conflicts over counsel and accounting fees. The exculpatory evidence, which Defense should have proffered, but did not, was that NIST ATP had in fact allocated CASI everything Karron asked for and showed was needed and lawful, as was the NIST ATP policy⁵⁷.

c. Hard evidence of re-class and other negotiated allocations withheld from Defense

The hard evidence of these negotiations was not made known to the Defense. The prosecution prevailed with soft evidence of witnesses relating “naysaying” testimony about Karron’s intransigence and hard forensic evidence of materially flawed exhibit GX114. Karron was convicted of paying indirect costs such as rent using government funds when in fact that cost was reclassified as direct salary to Karron.

6. Rent was reclassified as Salary

The main inculpatory line item in government exhibit GX114 was the rent line item⁵⁸. The Defendant’s persistence was considered as evidence of criminal intent⁵⁹ at trial. However,

17 documents are held, it's probably two feet long. The official
18 file resides in our grants office though, and I don't know how
19 large theirs is.

20 Q. You have never seen that?

21 A. I have seen it. I have no clue how large it is.

⁵⁷ Trial Transcript Page 128: Lide – direct ; LIDE Answering

1 A. What we hoped to accomplish was to have a discussion to try
2 to iron out the budget differences, because that had become a
3 major issue in this grant, was to get a budget that the awardee
4 could live with, and yet met the government rules and
5 regulations.

⁵⁸ Sentencing Transcript Page 72 MR. KWOK

14 The defendant was repeatedly told to stop. The

15 government wasn't in this to trip someone up. The trial

16 testimony established that the people who administered the

17 grant wanted to succeed.

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re-analysis of the GX1114 numbers reveals Karron in fact had good reason to persevere. ATP acceded to Karron's request to reclassify the rent. This significantly weakened the prosecution's case.

d. Checks tagged at rent are counted twice

The checks tagged as rent are counted twice. In the **first instance, this is done implicitly, as salary and the second instance explicitly, as rent**. This shows that the rent **must** have been previously reclassified by the NIST ATP grants staff as Budget Line Item A, Personnel, an **exculpatory action**. There **must** be more supporting documentation. Additional 3500 discovery supports this⁶⁰, as does hints in the trial transcript⁶¹.

7. Co-Funding from PI's Salary Theory

During the grant proposal budget discussions, the Defendant raised the issue of how to co-fund the grant. The consensus at the NIST ATP Program people and others⁶² who were advising Karron during the early pre-proposal stages was that the proposer's principal investigator (Karron) salary line, budget form line item A, was suitable source of co-funding.

e. Co-Funding from Salary amounts

Karron co-funded this project by turning back \$<<CITATION>> of her first year tax paid salary, \$<<CITATION>> of her second year tax paid salary, for a total co-funding out of personal funds of \$<<CITATION>>. These figures do not include co-funding from in-kind contributions, Accounts payables, or other sources.

⁵⁹ Trial Testimony Page 77 MR KWOK

4 For all of those reasons, because the defendant's

5 conduct is intentional and repeatedly so,

⁶⁰ GX2502-J Supporting spreadsheets fragments,, apparently from Riley, apparently in support of GX114, ignored at trial.

⁶¹ Ibid "The Government wasn't in this to trip someone up". But they clearly were doing precisely that here.

⁶² at the Baltimore National Meeting in 2001, including Benedict who would later join CASI and then join the OIG.

Trial Transcript Page 963, Benedict - direct

21 A. I was at an ATP proposers conference in the Spring of 2001.

22 Dr. Karron stood up in the conference during part of the

23 presentations in the Q. and A. session and he said that he had

24 just received a grant and was wondering if anybody had any idea

25 where he could get some financial guidance with the grants.

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8. "Hayes and Salary-ification"

Hayes created the "Salary-ification" process where unallocable or disallowed costs would be classified under salary for the purposes of the NIST ATP project, and classed under payroll for the purposes of taxation. The tax liability transfers the ownership of the funds. "Salary-ification" consisted of a series of journal entries in the then extant CASI Quick Books to keep track of the program direct and indirect costs being charged to Karron's personnel costs on budget line. The accounting concept of 'contra-account' means that for each credit in the co-funding a contra, or a debit would be made in the salary account.

f. Salary-ification was ignored in Hayes audit

At the time, the Defendant thought it was an imaginative and non-invasive method to let the research proceed without undue restraint from the accounting. Little did the Defendant realize this process would also be used for setting up the Defendant for an audit disaster from the very same accountant acting later as auditor (and possible thief).

g. Criminal court accepted the Journal Entries for Payroll Loan Advance Repayments

The criminal trial court accepted the use of journal entries in the issue of the initial 75,000 loan and its repayment. There is no reason the court should not accept co-funding by more journal entries missed at the criminal trial. When the full value of these adjustments is applied, it will become clear there was no actual crime and the defendant is actually innocent.

(28) Analysis of GX114 Errors and their meaning⁶³

That Government Exhibit GX114 is in error is self-evident. It appears to be partially made up. The Prosecution and the Prosecution Witnesses called CASI's books a mess⁶⁴, and

⁶³ Close Enough for Government Work? (Cotton, 2000)

⁶⁴ Trial Transcript Page 872 Spring - cross

10 Q. And is it fair to say that the Quick Books at CASI were a
11 mess?

12 MR. EVERDELL: Objection.

13 THE COURT: Overruled. I will get his judgment.

14 A. Yes. I mean that's kind of relative, but they could have
15 been in better shape.

16 Q. And the books, it was your opinion that the books were not
17 in good condition, right?

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implied that this mess hid inculpatory evidence. In fact, it is the Prosecutions own GX114 evidence that the Court called as “a mess”⁶⁵. Under this “mess” lay hidden exculpatory evidence of NIST ATP reclassification and fringe allowances. Is this harmless error⁶⁶, and without deeper meaning? On the other hand, are these plain errors⁶⁷ that belie deeper exculpatory truths? What do the patterns of errors reveal about the NIST ATP project?

9. Contradictory nature of GX114 errors

The natures of the errors in GX114 are clumsy and innumerate⁶⁸, not errors an experienced accountant such as OIG Auditor Riley would make⁶⁹. However, Riley is repeatedly held forth as the author of this exhibit⁷⁰. From analysis of Riley’s work papers, and her

⁶⁵ Sentencing Transcript Page 16

13 THE COURT: He underspent budget through those fringe
14 benefits by \$4,000 it says right above it. Look at that. This
15 is a mess.

⁶⁶ A harmless error is a ruling by a trial judge that, although clearly mistaken, does not meet the burden for a losing party to reverse the original decision of the trier of fact on appeal, or to warrant a new trial. Harmless error is easiest to understand in an evidentiary context. Evidentiary errors are subject to harmless error analysis, under Federal Rule of Evidence 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.”)[1]. The general burden when arguing that evidence was improperly excluded or included is to show that the proper ruling by the trial judge may have, on the balance of probabilities, resulted in the opposite determination of fact.

In the case of *Earl v. State of Wyoming* 2001 WY 66 29 P.3d 787, the Wyoming Supreme Court distinguished between reversible error (which requires a conviction be overturned) and harmless error (which does not), as follows: “... Before we hold that an error has affected an accused’s substantial right, thus requiring reversal of a conviction, we must conclude that, based on the entire record, a reasonable possibility exists that, in the absence of the error, the verdict might have been more favorable to the accused. *Jones v. State*, 735 P.2d 699, 703 (Wyo. 1987).” In the evidentiary context, a harmless error is usually one where the evidence had no relevance to the issues to be decided by the trier of fact, evidence admitted actually helped the party seeking the reversal, or the remaining evidence was overwhelmingly against the party seeking reversal.

⁶⁷ “plain error”. “Clearly Erroneous” Standard. Under the “clearly erroneous” standard, where a lower court makes a finding of fact, it will be reviewed for “plain error”. It will not be reversed unless the lower court has made a decision that has its basis in a plainly erroneous understanding of the facts. For example, if a court finds that the defendant was standing 30 feet from the curb, the appeals courts will not reverse this finding unless it is obviously in contradiction to the clear and undisputed facts. In US federal court, if a party commits forfeiture of error, e.g. by failing to raise a timely objection, then on appeal, the burden of proof is on that party to show that plain error occurred. If the party did raise a timely objection that was overruled, then on appeal, the burden of proof is on the other party to show that the error was harmless error. This approach is dictated by Federal Rule of Criminal Procedure 52, which holds, “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded...Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” It should be noted that the appellate court has discretion as to whether or not to correct plain error. Usually the court will not correct it unless it led to a brazen miscarriage of justice.

⁶⁸ Innumerate: A term meant to convey a person’s inability to make sense of the numbers that run their lives. Innumeracy was coined by cognitive scientist Douglas R Hofstadter in one of his *Metamagical Themas* columns for *Scientific American* in the early nineteen eighties. Later that decade mathematician John Allen Paulos published the book *Innumeracy*. (Paulos, 2001)

⁶⁹ Sentencing Transcript Page 4

6 ... I don’t know who compiled them, but I gather it
7 was Ms. Riley, but we never went into the detail about, ...

⁷⁰ Sentencing Transcript Page 4

11 They involved loans made which someone, I

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experience as a punctilious award-winning auditor⁷¹, and her honesty in admitting the⁷² omission of reconciliation of her audit under oath⁷³, the Defense posits here that one person could NOT be simultaneously honest, numerate, a professional accountant, a CPA, and simultaneously innumerate, and as clumsy with numbers as the execution of GX114 belies.

1)The two author in isolation hypothesis of GX114

The Petitioner proposes that two authors had their hands on GX114 without knowledge of what the previous person had deigned to denominate as Karron's wages. Before examining the *prima facie* issues with GX114, let us review the Courts' observations. We will refine this in advancing the "Two Authors in Isolation" hypothesis. Below we observe as the District Court struggles to determine Karron's salary and issues of loss from GX114, viz:

THE COURT: ... I might say that I've had some concerns about the loss computation. It's not clear to me that a failure to get approval of expenditures from the grant officer amounts to the same as an intentional misapplication of funds. ... So I have difficulties. For instance, looking at Exhibit 20 and 22 and the fringe benefits being allowed at 34 percent of salary, as I see it in the documents. I have difficulty also with the tabulation contained in Government Exhibit 114 and 115 because they are just rough calculations, as I see it. I don't know who compiled them, but I gather it was Ms. Riley, but we never went into the detail

12 don't know whom, I presume Ms. Riley, determined the equivalent

13 of salary

⁷¹ Riley Expert Witness Resume, Page 5, AWARDS (Number 4 of 4 total)

2005 DOC Silver Medal Award for Meritorious Federal Service "For conducting a complex and unique joint audit investigation of costs claimed against a scientific research cooperative agreement awarded by NSIT.[sic]"[emphasis added]: Further, the deference to credit for this project to a 'joint' collaborator begs the question if this was the CASI Accountant and Auditor Hayes being referenced as the joint author of her OIG audit for which she won commendation for.

⁷² Issuing an audit report, without reconciling all accounts is a breach of AICPA professional ethics American Institute of Certified Public Accountants, AICPA Professional Standards As of June 1, 2008 Code of Professional Conduct and Bylaws.

<http://www.aicpa.org/Research/Standards/CodeofConduct/DownloadableDocuments/2008CodeofProfessionalConduct.pdf> See also Ethics and the Auditing Culture: Rethinking the Foundation of Accounting and Auditing by David Satava¹, Cam Caldwell² and Linda Richard, Journal of Business Ethics, Volume 64, Number 3 / March, 2006 Pages 271-284. "Recent high profile events indicate that the accountants and auditors involved have followed rule-based ethical perspectives and have failed to protect investors and stakeholders – resulting in a wave of scandals and charges of unethical conduct. In this paper we describe how the rule-based traditions of auditing became a convenient vehicle that perpetuated the unethical conduct of firms such as Enron and Arthur Andersen.... [We make] suggestions that the accounting and auditing profession should consider to restore public trust and to improve the ethical conduct of accountants and auditors.

⁷³ Trial Transcript Page 473ff Line 24 *et seq.*

MR. RUBINSTEIN: Q. Did you do a bank reconciliation of the various bank accounts of CASI?

MS. RILEY: A. For this, for this audit?

Q. Right.3

A. No

For the full context of this witness admission and the resulting defense objection and sidebar discussion, see below.

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about, for instance, the statement in the tabulation that Dr. Karron's salary budgeted at 175, various cash. He spent 200,486, according to that tabulation. Those amounts, as I saw them, err were salary. They involved loans made which someone, I don't know whom, I presume Ms. Riley, determined the equivalent of salary. As I alluded to earlier, the fringe benefits figure in this tabulation -- **I'm looking at 114 says that Dr. Karron didn't spend \$40,337 in fringe benefits, and yet in the same tabulation it says that the fringe benefits were not allowed and spent \$4,081.** That whole scenario of fringe benefits is somewhat illusive to me. The testimony, as I recollect it, was CASI, the corporation, did not have a formal benefit plan and they were endeavoring to compile one during the time of the grant. And instead what Dr. Karron did was to pay benefits just as he was accustomed to paying them, for whatever medical expenses the various employees had for their wives. I have some difficulty in, finding that there was criminal intent with respect to these expenditures, which are all on Government 114, and with the manner in which those over expenditures were computed. **It seems to me this is just a rough calculation and not something that a Court could rely on in a criminal case.** I'll hear from you. **That's my assessment of that proof.** [Emphasis Added]

Sentencing Transcript Page 3-5 ff Line 1 *et seq.*

The following section is the prosecution digging deeper and deeper into a mess much worse than they realize. No one at that time realizes the full and real meaning in the figures. The Prosecution is being evasive on the backup for GX114 for the spreadsheets GX110 as discussed below. The two prosecutors Kwok and Everdell attempt to argue and insist, with no factual rational, that GX114 has any basis in reality or in GX110. Here the Judge realizes he cannot make some combination of the numbers from GX110 come out on GX114. Something is wrong, *viz*:

THE COURT: But it doesn't meet it because in her spreadsheet she doesn't have any payment like \$248,000 worth of salary in year one.

MR. KWOK: Your Honor, she does. [really ?] That number is the net transfers.

THE COURT: I've looked at salary, I think.

MR. KWOK: Including the tax withholding, I believe is the testimony that she testified to. When you take into account all the money that Dr. Karron took out from CASI, minus the amount that he paid back --

THE COURT: **That isn't salary. We are talking about salary. I don't see salary. There is nothing like salary in those documents that equals 248 -- \$200,488.**

MR. KWOK: Salary is just a heading. What she meant by this is money that defendant took, pure money, not in terms of expenditure; cash that he took from CASI, whether in the form of quote unquote loan or whether in terms --

THE COURT: **Show me. She has no tabulation putting [GX]114 into context with her [GX]110, Exhibit [GX]110.**

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THE COURT: I guess we will have to get 110, because I don't think I have it here, but I'm fully familiar with it. I think it's in Mr. Rubinstein's submission, as a matter of fact.

...

THE COURT: They are certainly not in those records, a showing of \$200,488 in salary.

MR. KWOK: If I can explain how she got that number.

THE COURT: **It's denominated salary. It's a table saying salary. I don't care how she got the number.**

Sentencing Transcript Page 5-7[Emphasis and Editorial Added]

10) Specific Problems with GX114

1. The line item categories in GX114 appear *ad hoc* and do not correspond with the NIST 1262 official budget object class categories⁷⁴.
2. There is no congruence between the NIST 1262 budget categories and the GX114 line item categories one which to calculate percentage changes relative to the budget.
3. The % Column is incorrectly based. The base for percentage changes relative to budget is by statute to be 10 % of the federal **and** non-federal share.
4. The pie charts showing percent excess budget changes are therefore misleading and incorrect.

Amendment # 2 - 1/4/02	10/1/2001 - 10/10/2002		%	
	Budget	CASI Spent	Difference	Difference
Subcontractor	\$250,000	\$75,962	(174,038)	-69.62%
Dr. Karron Salary	\$175,000	\$200,488	25,488	14.56%
Other Employees' Salaries	\$150,000	\$141,922	(8,078)	-5.39%
Equipment	\$110,000	\$189,819	79,819	72.56%
Dr. Karron Fringe Benefits	\$59,500	\$19,163	(40,337)	-67.79%
Other Employees' Fringe				
Benefits	\$51,000	\$20,222	(30,778)	-60.35%
Travel	\$20,000	\$10,914	(9,086)	-45.43%
Materials / Supplies	\$11,000	\$26,364	15,364	139.68%
Audits	\$10,000	\$5,000	(5,000)	-50.00%
Dr K Rent	\$0	\$60,000	60,000	
Other- (Bookkeeping /				
Auto Exp / Bank				
Processing Consultants /				
Lawyers / Dues	\$0	\$43,592	43,592	-
Utilities	\$0	\$16,341	16,341	

⁷⁴ NIST 1262 Budget Form Categories A. Personnel Salaries Wages,
B. Personnel Fringe Benefits,
C. Travel,
D. Equipment,
E. Materials/Supplies,
F. Subcontracts,
G. Other

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Dr. Karron Fringe				
Benefits -Not Allowed Other Employees'	\$0	\$4,081	4,081	-
Fringe Benefits - Not	\$0	\$5,751	5,751	-
Capital Improvement	\$0	\$11,248	11,248	-
Cleaning - D. Ferrand	\$0	\$5,019	5,019	-
Meals	\$0	\$1,936	1,936	-
Total Direct Costs	\$836,500	\$837,822		

Table 1 GX114

10. The Explanation for the Karron Salary Line is to include Rent Checks

The **only** explanation that can account for the \$200,488 salary figure is to add in the **rent** and the **net loan** proceeds and apply 8.08% estimated tax loading on THE RENT ONLY⁷⁵. The very low net salary figure is also off because it ignores large journal entries for salary advances taxes, made up by reclassifying early payroll loans as salary here as well⁷⁶. That implies that the **rent** was reclassified to salary, at least at some past period in this saga.

11)The RENT paid to KARRON was reclassified as SALARY.

Under the terms of the Cooperative Agreement, ATP was substantially involved in CASI affairs, as opposed to this being a regular grant⁷⁷. There were no 'secrets', there was no 'fraud', perhaps except for Karron's gender dysphoria⁷⁸. ATP and CASI were actively negotiating various budget and allowance issues from the very start of the project. It now appears that all of these requests [power, internet, and benefits] were effectively granted, as revealed here and in

⁷⁵RILEY: A. By including the withholdings portion of the fringe benefits as part of the salary of what he received. It includes the salary, it includes the difference between the loans he received and the loans he paid, and it includes the fringe benefits. Trial Transcript Page 803 Line 22 *et seq.*

⁷⁶MR. RUBINSTEIN: Q. Do you have any documentation to show \$165,000? [in additional salary]. RILEY: A. This chart was prepared from the check register. The 200,000 comes from the loan -- the difference between the loan, the loan pay back and the amount of salaries that he received, plus the withholdings from applicable payroll, withholdings, ... Trial Transcript Page 806 ff Line 21 *et seq.*

However, this testimony is still misleading and incorrect, because net loan proceeds by her register GX110 shows \$(92,850.00) in net loan proceeds. \$(60,000) is needed to bring the total unloaded salary to \$(152,850.00). Loading that with fringes of \$(12,345.01) brings the salary to the stated \$(200,488.59). The actual gross salary is higher still if we remove the taxes on the net salary to make it gross. Dunlevy gives her analysis in her affidavit attached. Riley must have known knew about the rent and her answers were evasive.

⁷⁷ Trial Transcript Page 120 ff Line 19 *et seq.*, quoted previously.

⁷⁸ Gender Dysphoria: Gender identity disorder (GID) is the formal diagnosis used by psychologists and physicians to describe persons who experience significant gender dysphoria (discontent with the biological sex they were born with). It is a psychiatric classification and describes the attributes related to transsexuality, transgender identity, and transvestism. (Wikipedia, 2010)

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the original Riley audit work papers. Further, as we will show further on, the aggregate budget changes did not rise to meet the plus or minus 10 percent, budget permission threshold if the appropriate base is used<<REFERENCE TO SECTION>>. We see this in many pieces of evidence discussed previously, including the Orthwein Kickoff Meeting agenda memo (Orthwein, 2001), Snowden Trial Testimony⁷⁹ and in Progress Reports 1 through 6 (CASI, 2002), (CASI, 2002) (CASI, 2002) (CASIq, 2002) (CASI, 2002) (CASI, 2003) (CASI, 2003) as well as various e-mail threads(see section "ATP Substantial Involvement"). Hayes, the ATP 'independent' auditor devised the ill-fated scheme to solve all of Karron's initial 'draws' by reclassifying them as salary and calculated the payroll taxes on these re-classes⁸⁰. She also discussed this with Snowden, of ATP of this early on⁸¹, as discussed in Snowden's testimony about initial advances made to Karron⁸². Then at some point in early 2003 Hayes decided to

⁷⁹MS. SNOWDEN Q. Now, you told us that you had these discussions with Gurfein about the rent, correct? A. Yes.

MR RUBINSTEIN: Q. And that was early on in the grant?

A. The discussion was before the kick-off presentation and after the kick-off presentation, so in October and in November.

Q. 2001.

A. 2001.

Q. And then --

THE COURT: You had those with Gurfein.

THE WITNESS: With both Gurfein and Dr. Karron.

Trial Transcript Page 379 ff Line 25 *et seq.*

⁸⁰MR. SPRING: ... I was aware once I sat down with Dr. Karron that there were corrections that needed to be made for the books in preparation for the audit by the ATP-appointed person Joan Hayes.

MR. RUBINSTEIN: Q. It was your understanding that Joan Hayes was appointed by ATP?

Trial Transcript Page 871 Line 1 *et seq.*

⁸¹MR. RUBINSTEIN: Q.: And is it fair to say that Hayes called between September 30, 2002 and the end of that year 2002 and asked you about the deductibility of the rent, correct?

MS. SNOWDEN: A. It's fair to say that within that time period I was called by Joan Hayes and she did ask about the rent.

Q. And in your discussions with either Lee Gurfein or Dr. Karron about the deductibility of the rent did you suggest to either of them that they could increase Dr. Karron's salary and he could pay the rent out of an increase in salary?

A. No.

Q. I mean he could do anything he wants with his \$175,000 that he gets paid in the initial year, correct?

A. If he gets a paycheck, just like me and you when we get our paycheck, you can do whatever you want with it.

Trial Transcript Page 381 Line 5 *et seq.*

⁸² MR. RUBINSTEIN: Q. Now, did there come a time that you learned that Dr. Karron had taken any loan from the funds, the ATP funds of \$75,000?

MS. SNOWDEN: A. I heard -- I wasn't --

THE COURT: No. Did you --

THE WITNESS: Did I ever hear that?

THE COURT: In your capacity.

THE WITNESS: I heard that.

Q. And did you have any conversations with Dr. Karron about that \$75,000?

A. No.

THE COURT: When did you hear it?

THE WITNESS: From Joan Hayes.

THE COURT: What?

THE WITNESS: From Jones Hayes the auditor.

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forget her journal entries in her Audit and disavowed all of the re-classes and even attempted to disavow her knowledge of the rent in her audit report language⁸³ despite her having prepared Karron's personal taxes and the CASI 1099 forms reflecting the payment rental income from CASI⁸⁴ to Karron.

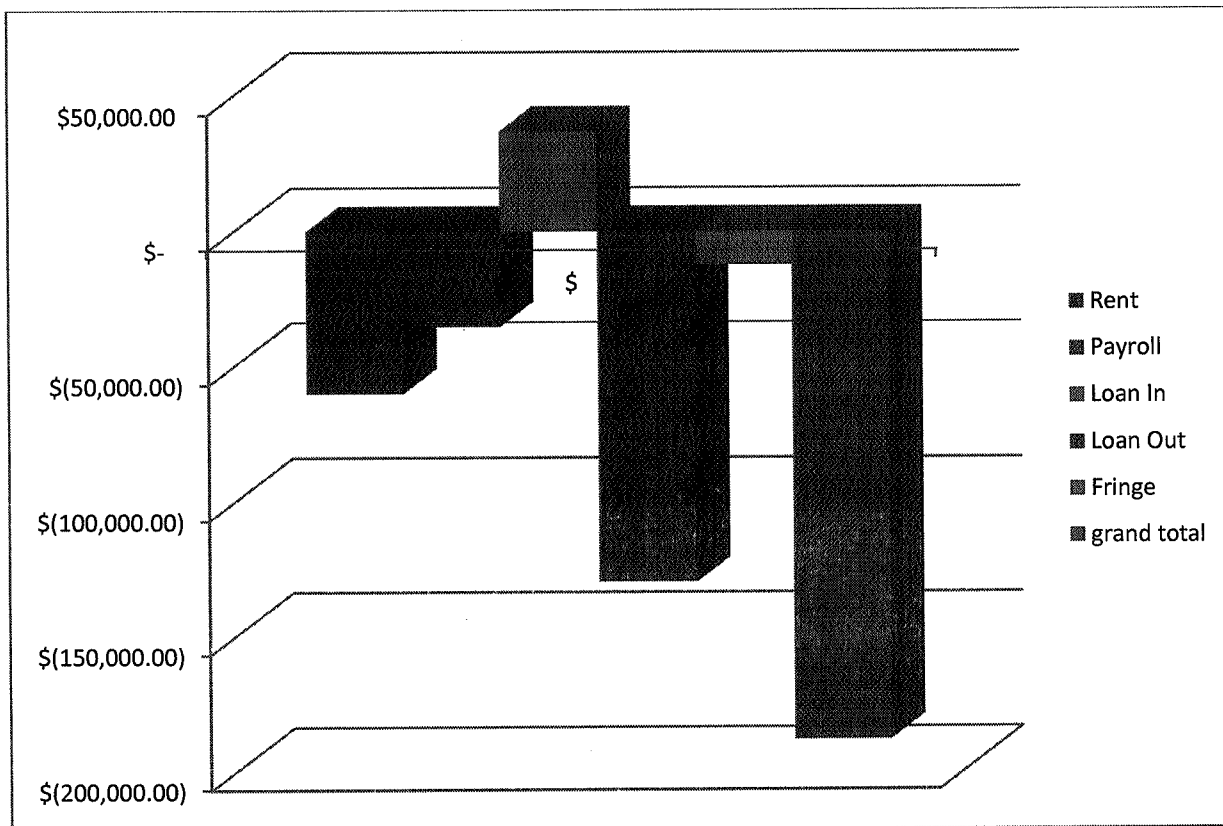


Figure 1 GX114 Karron Salary Component Breakdown showing Rent is the biggest component

Trial Transcript Page 382 Line 10 *et seq.*

⁸³ During our[Hayes] examination of cancelled checks, we noted that certain expenditures of the award recipient, which were not directly related to the ATP project, were paid with federal funds provided for the ATP project. These payments were made to the Principal Investigator for rental expense, at the monthly rate of \$2,000, for the use of his apartment as office space. GX 050 Page 11, First 'Item'.

⁸⁴ See Karron Affidavit AC <<DBK PERSONAL TAXES PREPARED BY HAYES>>

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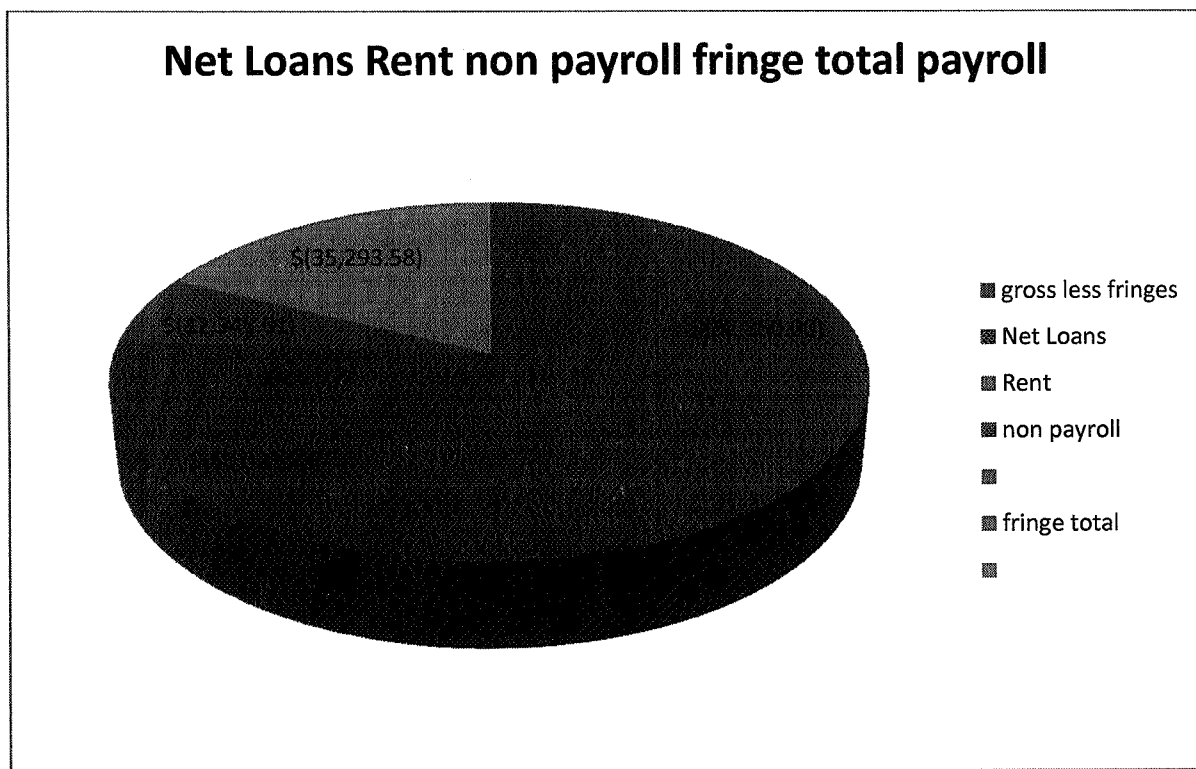


Figure 2 Karon GX114 Salary components showing proportion of rent relative to cash and fringes

It now appears that this reclassification plan was approved, but no formal written budget change was required as no budget changes reached the minimum plus minus 10 percent threshold magnitude. Approval was not required or this but this discussion was suppressed or just not considered important at the time.

h. A second author on GX114

A second person desired to highlight rent and fringe on GX114. This second authors' edits were was innumerate in character. This second author did not prepare accounting data for this exhibit. Had they done so, they would have known what elements were already in the Karon salary total. Because of this clumsy addition to GX114 without the concomitant subtracting the rent and fringes from the other items, we can now demonstrate this as evidence of this initial exculpatory reclassification.

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Using only GX110 numbers, and Riley's attempted rationalization of fringe benefit rate⁸⁵, it is an inescapable conclusion that the "denominated" salary figure of \$200,488 must necessary include the \$60,000 initially classified by Karron as rent on the paper invoices and checks. See relevant entries of GX110 below.

⁸⁵ MR. RUBINSTEIN: Q. CASI spent \$200,488 on his salary. How did you get that number?

MS. RILEY: A. By including the withholdings portion of the fringe benefits as part of the salary of what he received. It includes the salary, it includes the difference between the loans he received and the loans he paid, and it includes the fringe benefits. Trial Transcript Page 803 Line 19.

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Dr. Karron		(60 detail records)	Sum	\$ (188,143.58)
Loan		(15 detail records)	Sum	\$ (129,850.00)
1058	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/17/2001 2953 Per Check Register -Capital Loan	\$	(300.00)
1083	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/23/2001 2961 Emergency Loan	\$	(300.00)
1059	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/28/2001 2962 Per Check Register - Salary Advance	\$	(75,000.00)
1061	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	12/21/2001 3103 Per Check Register - DBK (Vendor) Capital Loan NIST	\$	(500.00)
1072	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/1/2002 3144 Per Check Register - DBK (Vendor) Capital Loan NIST (per GL Loan Repay-CASI ACCT)	\$	(1,000.00)
1073	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/1/2002 3145 Per Check Register - DBK (Vendor) Capital Loan NIST(per GL Loan Repay-CASI ACCT)	\$	(5,000.00)
1074	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/7/2002 3151 Per Check Register - DBK (Vendor) Capital Loan NIST	\$	(5,000.00)
1075	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/12/2002 3153 Per Check Register - DBK (Vendor) Capital Loan NIST	\$	(4,000.00)
1098	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/25/2002 3155 (Karron Draw)(per GL DBK Loan)	\$	(2,000.00)
1076	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	4/1/2002 3160 Per Check Register - DBK (Vendor) A/P (per GL Karron Draw - DBK Loan)	\$	(13,000.00)
1079	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	5/24/2002 3184 Per Check Register - DBK (Vendor) A/P (Per GL - DBK Loan)	\$	(2,000.00)
1080	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	6/25/2002 3193 Per Check Register - DBK (Vendor) A/P (Per GL Karron Draw - DBK Loan)	\$	(1,000.00)
1106	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	8/19/2002 10407 (Per GL - DBK Loan)	\$	(750.00)
1107	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	9/13/2002 10451 (Per GL Karron Draw - DBK Loan)	\$	(15,000.00)
1108	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/4/2002 10473 (Per GL Karron Draw - DBK Loan)	\$	(5,000.00)
Loan Repay		(7 detail records)	Sum	\$ 37,000.00
1047	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	10/11/2001 Emergency Loan - Ck # 1006 (prior to NIST First Deposit 10/26/2001)	\$	2,000.00
1051	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	12/4/2001 Loan to Corp - chk # 5189	\$	5,000.00
1050	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	2/25/2002 Emergency Loan to Corporation - Chk # 1052	\$	1,000.00
1042	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	8/13/2002 loan to company - chk # 1121	\$	20,000.00
1043	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	8/16/2002 loan to company - chk # 1122	\$	1,000.00
1054	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	9/4/2002 (Check # 5301) (Per GL - DBK Loan repay NIST)	\$	3,000.00
1045	Check or Online Bnkg Trnsf From Chk # 131-0684916-65 (Dr. Karron)	10/4/2002 chk # 1129 (Per GL - DBK Loan repay CAST)	\$	5,000.00
Payroll		(8 detail records)	Sum	\$ (35,293.58)
1057	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	5/13/2002 10192 (7/7/2002 - 7/7/2002 Pay Period)	\$	(5,019.84)
1115	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	6/3/2002 10212 5/1/2002 - 5/31/2002 pay period	\$	(5,002.25)
1127	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	7/2/2002 10280 (6/1/2002 - 6/30/2002 pay period)	\$	(25,023.17)
1130	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	7/2/2002 Check Reversal # 10280 (6/1/2002 - 6/30/2002 pay period)	\$	25,023.17
1117	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	7/5/2002 10290 (10/1/2001 - 10/31/2001 Pay Period)	\$	(5,552.01)
1120	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	7/5/2002 10291 (11/1/2001 - 11/30/2001 Pay Period)	\$	(4,756.38)
1121	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	7/5/2002 10292 (12/1/2001 - 12/31/2001 Pay Period)	\$	(9,288.07)
1055	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	8/13/2002 10401 (7/1/2002 - 7/31/2002 Payperiod)	\$	(5,675.03)
Rent on Office		(30 detail records)	Sum	\$ (60,000.00)
1087	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2977 Rent on Office - (per GL -Jan 00 Rent)	\$	(2,000.00)
1088	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2978 Rent on Office - (per GL -Feb 00 Rent)	\$	(2,000.00)
1089	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2979 Rent on Office - (per GL -March 00 Rent)	\$	(2,000.00)
1090	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2980 Rent on Office - (per GL -April 00 Rent)	\$	(2,000.00)
1091	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2981 Rent on Office - (per GL -May 00 Rent)	\$	(2,000.00)
1092	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2982 Rent on Office - (per GL -June 00 Rent)	\$	(2,000.00)
1093	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2983 Rent on Office - (per GL -July 00 Rent)	\$	(2,000.00)
1094	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2984 Rent on Office - (per GL -Aug 00 Rent)	\$	(2,000.00)
1095	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/26/2001 2985 Rent on Office - (per GL -Sept 00 Rent)	\$	(2,000.00)
1084	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	11/9/2001 3040 Rent on Office - (per GL -Jan 01 Rent)	\$	(2,000.00)
1096	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	11/23/2001 3064 Rent on Office - (per GL -Feb 01 Rent)	\$	(2,000.00)
1085	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	12/11/2001 3093 Rent on Office - (per GL -Mar 01 Rent)	\$	(2,000.00)
1086	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	12/11/2001 3094 Rent on Office - (per GL -Apr 01 Rent)	\$	(2,000.00)
1060	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	12/14/2001 3100 Per Check Register - DBK Rent - (per GL -Dec 01 Rent)	\$	(2,000.00)
1062	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	12/28/2001 3107 - (per GL - June 01 Rent)	\$	(2,000.00)
1063	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	12/28/2001 3108 - (per GL - May 01 Rent)	\$	(2,000.00)
1064	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	1/9/2002 3115 Per Check Register - DBK Rent (Per GL July 01 Rent)	\$	(2,000.00)
1065	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	1/9/2002 3116 Per Check Register - DBK Rent (Per GL Aug 01 Rent)	\$	(2,000.00)
1066	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	1/9/2002 3117 (Per GL Sept 01 Rent)	\$	(2,000.00)
1067	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	1/11/2002 3122 Per Check Register - DBK Rent (Per GL Jan 02 Rent)l	\$	(2,000.00)
1068	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	2/1/2002 3129 Per Check Register - DBK Rent (Per GL Oct 01 Rent)	\$	(2,000.00)
1069	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	2/1/2002 3131 Per Check Register - DBK Rent (Per GL Nov 01 Rent)	\$	(2,000.00)
1070	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	2/1/2002 3132 Per Check Register - DBK Rent (Per GL Feb 02 Rent)	\$	(2,000.00)
1071	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/1/2002 3143 Per Check Register - DBK Rent (Per GL March 02 Rent)	\$	(2,000.00)
1097	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	3/1/2002 3142 (December 00 Rent)	\$	(2,000.00)
1077	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	4/1/2002 3164 Per Check Register - DBK Rent (per GL April 02 Rent) t	\$	(2,000.00)
1078	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	5/2/2002 3175 Per Check Register - DBK Rent (per GL May 02 Rent)	\$	(2,000.00)
1099	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	6/4/2002 3185 (Rent)	\$	(2,000.00)
1105	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	7/15/2002 10323 (per GL July 02 Rent)	\$	(2,000.00)
1081	Check or Online Bnkg Trnsf To Chk # 131-0684916-65 (Dr. Karron)	10/7/2002 3200 Per Check Register - DBK Rent (per GL Aug 02 Rent)	\$	(2,000.00)

Table 2GX110 showing only relevant section of spreadsheet data detailing checks from and to Karron for year 1 alluded to in GX114 testimony.

12)Is there any other explanation?

Does this implicit reclassification represent an ATP harmless error of arithmetic or evidence of good faith negotiations of the NIST ATP to help Karron quashed by the OIG? The only apparently supporting spreadsheet is Government Discovery *Exhibit 3502-J*. Let us look at

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the possibility that the rent is not included in the elements summed to arrive at the putative total salary of \$200,488. The only other free salary or wage like element, are the fringes.

i. Can fringes make up the missing \$60,000?

We cannot reasonable assume a fringe value approaching \$100,000, almost half of the total value. Such a large fringe rate and value is unreasonable and not justified by the available pool of fringe-like cost elements from which to choose.

We also note that fringes were separately listed and 'not allowed', which brings up another contradiction of simultaneous inclusion and exclusion of same element transactions.⁸⁶ This also bothered the Court.⁸⁷ Therefor it is unreasonable to hypothesize that fringes can expand to fill up the gap left if we do not include \$60,000 worth of rent reclassified as salary.

ii. Can this be an innocent harmless error?

Is this is an innocent Harmless error? Two salary elements, rent and fringes, are double counted. The goal of the author was to make line items out of classes of items that author considered egregious crimes. However, the author did not subtract the items they were highlighting One would hope that the 15 months of incarceration suffered by the Defendant were not because of careless arithmetic or spreadsheet error. One can only hope that the Plaintiff fact checked and reviewed carefully exhibits used in the criminal trial. Clearly, the adversarial nature of criminal trial should have caught these errors, instead of the trial judge. In this case, they did

⁸⁶ Sentencing Transcript Page 15

21 THE COURT: Look. Let's go right to an item that
22 bothers me, fringe benefits. They were approved at 34 percent
23 of salary. No one said what constitutes a valid, as far as I
24 could find in the papers in the court, what was a valid fringe
25 benefit and what wasn't. How can I have any confidence that
1 not approved fringe benefits of \$4,000 is something that is a
2 willful disregard of the Rules?

13 THE COURT: He underspent budget through those fringe
14 benefits by \$4,000 it says right above it. Look at that. This
15 is a mess.

⁸⁷ Sentencing Transcript Page 4

14 As I alluded to earlier, the fringe benefits figure in
15 this tabulation -- I'm looking at 114 says that Dr. Karron
16 didn't spend \$40,337 in fringe benefits, and yet in the same
17 tabulation it says that the fringe benefits were not allowed
18 and spent \$4,081. That whole scenario .of fringe benefits is
19 somewhat illusive to me.

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not. Considering the expectation of higher standards of care and safeguards in criminal trials relative to civil trials, that if this “careless hypothesis” were the actually, one must then consider this negligence beyond harmless error because of the dire consequences of this error for the Defendant.

iii. Are these figures made up?

Some categories of GX114 appear to be made up, along with the numbers in the category line items. They do not correspond to any of the NIST ATP budget object codes. We must also consider the possibility that the Karron salary number, and possibly that some or all of the numbers in GX114, are made up and have no basis in any of the numbers in GX110. Given the inability to find any combination of GX110 Karron transactions that sums exactly to this value of \$200,244, and that we are forced to apply a portion of unspecified fringes, we must also consider the possibility that **some** the number(s) is (are) maliciously, made up and without any basis in the tabulation in GX110.

13) Two authors in isolation are the only reasonable explanation for the errors in GX114

If one attempts to reconstruct how these figures were arrived at, one is brought by arithmetic and logic to the inescapable conclusion that GX114 was constructed by two different people working successively and in isolation. The first author, probably Riley, attempted to capture all of the grant spending and could not make it add up to the disbursed amount. This is because they were ordered or, refused to consider any other spending accounts (Credit Cards, PayPal Debit Cards, Cash, Gas Travel, Car Rental card amongst others). Another person subsequently took this list and just added in items, without regard to backup documentation and without the realization that some items were already in the partial first total, to bring the total to the ATP grant disbursed amount. If this is indeed the case, this second person did not realize, or perhaps care, that the rent, already reclassified into salary, as negotiated a long time ago, was re-entered a second time as rent without being subtracted from Salary.

14) GX114 is Evidence of a Prior Negotiated Reclassification or Allowance

During negotiations to arrive at a new budget, the CASI worked closely with the ATP grants office through the efforts of the CASI Business Manager Peter Ross, PhD. Peter Ross was

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interviewed by the OIG sometime after 2006. Defense Counsel attempts to get him to testify for the Defense at the criminal trial were to no avail. Ross must have made a statement at his interview. The field agents must have field notes of their encounter with Ross. Defense Counsel Rubinstein characterized Ross's attitude during his phone call as too scared to make coherent responses to Rubinstein's questions. One must consider the possibility that Ross was coercively questioned to be too frightened to participate in Karron's trial. The failure of the Prosecution to submit Ross's affidavit or the Special Agents field notes is a *Brady v. Maryland* rule violation.

A number of understandings and accommodations were reached during the final days of the project budget negotiations. These were in the process of being codified in a grant budget amendment. These consisted of a number of specific exceptions and allowances, as well as a reclassification of certain payments as Wages/Salary. This is because the payments were considered misclassified as Rent, and were better characterized as Wages/Salary because they were made to the PI, in the same way as other Personnel costs were. The funds were considered as income to the PI, and captured on the Defendant's income taxes by the CASI Accountant and Auditor Hayes.

Budget fixes were reached, but for some reason never made it to a new budget being negotiated by Peter Ross, the project manager at the time. Other factors triggered the suspension. One of them was unstable actual figures. Hayes was feeding Ross audit numbers, who was submitting them as budget actuals to Karron for submission to Snowden. Unknown to Karron or Ross, Hayes was changing the audit figures week to week. This instability in budget numbers was what ostensibly triggered an audit.⁸⁸ We now know that Hayes was a terrible accountant, and her audit figures were not only unstable, but hostile and patently wrong in almost every way the forensic bookkeeper Dunlevy tested them. *Dunlevy Decl Lead Sheets*

(29) **Karron Salary**

⁸⁸ Trial Transcript Page 141 Line 2 on. Lide discusses problems with getting actual figures.

3 A Because we found it difficult to reconcile these budgets,
 4 especially the actuals for year one, we were concerned that the
 5 company was not able to account for government spending, and we
 6 prepared a document for our supervisor to send to the grants
 7 office requesting an audit.

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At the trial, the Government cites Karron year one salary figures ranging from a low of \$ 35,293.58.⁸⁹⁹⁰, \$175,000⁹¹ \$200,488⁹² to \$253,913⁹³. Hayes prepared the Defendants 2002 Tax return, but abruptly quit and it was completed by Solomon and Schwartz⁹⁴ Dunlevys' forensic analysis shows Karron's total Tax Paid salary for the entire project period was \$334,004.12⁹⁵

The above discrepancies' in Karron's salary can be reconciled by looking deeper into what Karron was paid and where it went. The net cash Proceeds of \$35.983 (below) reflect the small net amount that Karron actually 'got'. Most of the money went to two 'destinations': Taxes and to pay back the initial Salary Cash \$75,000 Cash advance with which Karron boot strapped the project with. This is the 'Loan receivable Colum, Which was tracked as account 'DBK AC 190' in Dunleys' Forensic Reconstruction. *Dunlevy Declaration*

Karron salary, under ATP rules consisted of more than Taxes and Loan Repayments. Non Tax fringes, by statute include medical and other benefits. This is an unusual feature of the ATP statute, in which fringes are considered direct costs. This was done to help smaller businesses pay for Personnel with ATP funds. Usually they are related to indirect costs.

⁸⁹ THE COURT: She[RILEY] has got a salary category. She shows it. Go on a couple of pages. Payroll, next page, \$35,293.58. *Sentencing Transcript Page 9 Line 18-19.*

⁹⁰ MR. RUBINSTEIN: and you see his payroll checks which I put into evidence as P-1 through P-6, where his total amount for the year is about \$35,000. Ask yourself, he gets \$175,000, how does he only have \$35,000? *Trial Transcript Page 1293 Lines 20-24*

⁹¹ GX50, Hayes audit report

⁹² GX114 OIG

⁹³ <<CITATION>>the CASI Payroll Tax Returns as prepared by Hayes. Note that Karrons' Personal 2001 returns were prepared by Hayes<<CITATION>>. Hayes prepared the Karron 2002 and 2003 W2's for CASI<<CITATION>>.

⁹⁴ Hayes completed Karron's 2002 tax return in July 2003, but refused to file it; she returned it to Karron but signed the extension request and completed the W2 forms before she "submitted" the ATP audit report in August 2003. *Karron Declaration Exhibit 110.*

⁹⁵ *Declaration of Dunlevy Ex. CAC 291*, mid page right. Copies of Karron's applicable tax returns are included in *Declaration of Karron*.

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Date	Check #	Gross	FWT	FICA	Medicare	NY State	NY City	NY DBL WH	Loan Receivable DBK AC 190	Check
5/11/02	10192	8,333.33	(1,909.00)	(516.67)	(120.83)	(493.56)	(270.83)	(2.60)		(5,019.84)
6/3/02	10212	8,333.33	(1,909.00)	(516.66)	(120.84)	(493.56)	(288.42)	(2.60)		(5,002.25)
7/5/02	10290	14,583.33	(3,555.00)	(2,970.83)	(976.69)	(987.78)	(538.42)	(2.60)		(5,552.01)
7/5/02	10291	14,583.33	(3,555.00)	(4,531.69)	(211.46)	(987.78)	(538.42)	(2.60)		(4,756.38)
7/5/02	10292	14,583.33	(3,555.00)	0.00	(211.46)	(987.78)	(538.42)	(2.60)		(9,288.07)
8/2/02	10401	61,918.07	(17,104.00)	(2,091.63)	(462.81)	(4,351.00)	(2,231.00)	(2.60)	(30,000.00)	(5,675.03)
		122,334.72	(31,587.00)	(10,627.48)	(2,104.09)	(8,301.46)	(4,405.51)	(15.60)	(30,000.00)	(35,293.58)
9/30/02	AJE	61,918.00	(17,104.00)	0.00	(897.81)	(4,351.00)	(2,231.00)		(37,334.19)	0.00
	Total Paid	184,252.72	(48,691.00)	(10,627.48)	(3,001.90)	(12,652.46)	(6,636.51)	(15.60)	(67,334.19)	(35,293.58)

Table 3 Gross and Net Salary Paid to Karron for Year Ending 9/30/2002

15) Early Salary Advances and repayments; Proceeds used to bootstrap startup costs

Date	Num	Description	Memo	Amount	Balance
9/1/2001		Opening Balance		\$ -	\$ -
9/28/2001	DEP5180	Deposit	2001-10-22 statement	\$ (900.00)	\$ (900.00)
10/1/2001					\$ (900.00)
10/11/2001	DEP1006	Computer Aid Surgery Inc	2001-10-22 statement	\$ (2,000.00)	\$ (2,900.00)
10/14/2001	2953	D B Karron, Ph.D.		\$ 300.00	\$ (2,600.00)
10/26/2001	2962	D B Karron	2001-11-23 statement	\$ 75,000.00	\$ 72,400.00
10/26/2001	2961	D B Karron, Ph.D.	2001-11-23 statement	\$ 300.00	\$ 72,700.00
12/4/2001	DEP5189	Computer Aided Surgery	2001-12-21 statement	\$ (5,000.00)	\$ 67,700.00
12/21/2001	3103	D B Karron PhD	2001-12-21 statement	\$ 500.00	\$ 68,200.00
8/2/2002	10401	D B Karron	BELINDA Ex 110 pg 39 of 44	\$ (30,000.00)	\$ 38,200.00
8/16/2002	DEP1122	Deposit	2002-08-23 statement	\$ (865.81)	\$ 37,334.19
9/30/2002	JRNL	D B Karron	no paypaycheck	\$ (37,334.19)	\$ -

Table 4 Karron Loan wage Advance Balance

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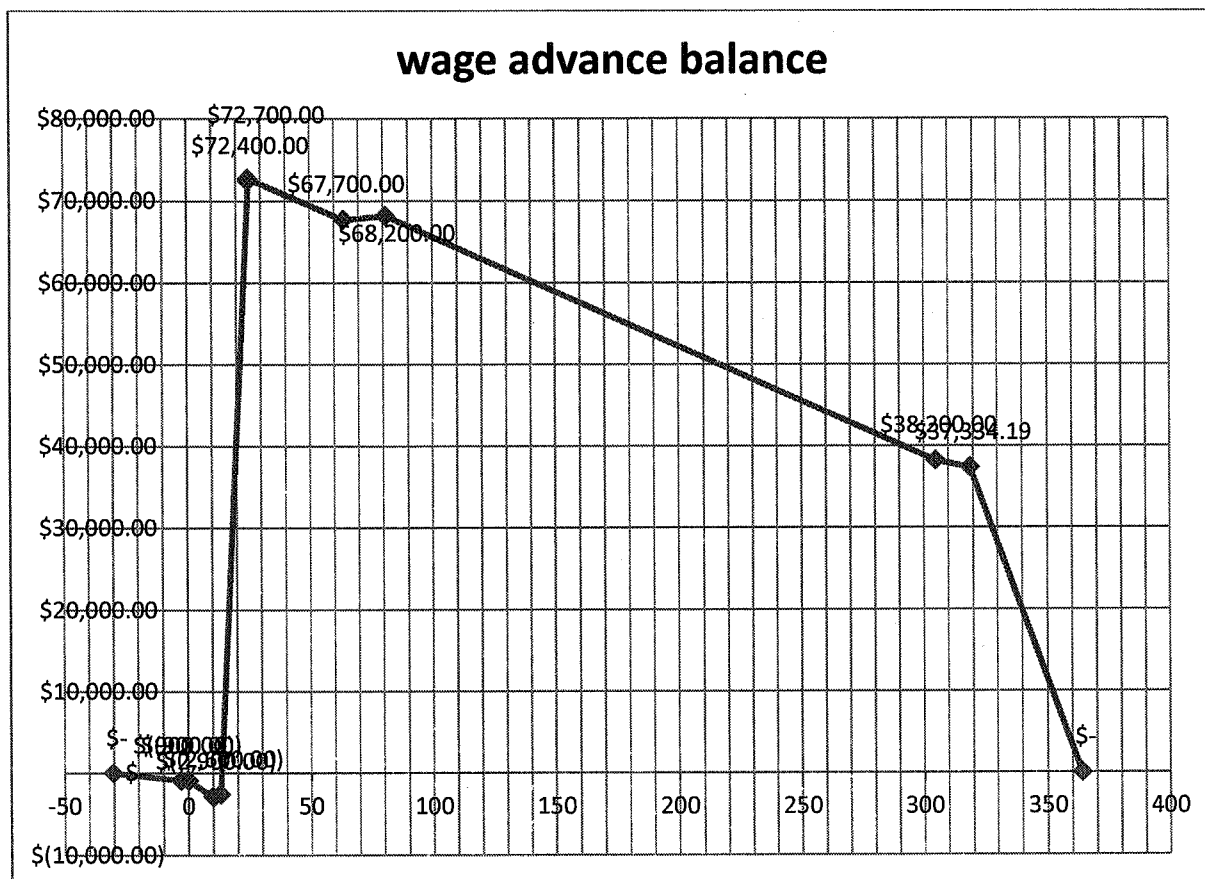


Table 5 Karron Payroll Loan Advance Balance Chart

(30) Karron's Co-Funding cash contribution

Karron has the right to fund her grant out of her tax paid salary. This is not 'double dipping',⁹⁶ because the funds are *bona fide* after tax paid funds. *Dunlevy Decl Page AA003, midpage*

16) Karron Co-Funding should have been obvious as related party transaction

In small company audits, there is particular focus on related parties- officers, partners, major shareholders. Karron was 90% owner of Computer Aided Surgery, Inc; Special attention should have been paid to the monies that went to and from Karron for the benefit of CASI. This

⁹⁶ Trial Transcript Page 1066 Line 22 et seq. Benedict Cross, See Karron Declaration Exhibit 57.

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co-funding is \$ 78,204.28 is 9.77% of the grant amount for the first year of \$800,000. The Prosecution incompletely suppressed this evidence.

17)Co-Funding Elements

The minimum required co-funding, was %4.75, incorrectly calculated in the initial budget, corrected in amendment XXX, or some \$35,000. The forensic reconstruction from Dunlevy (*Dunlevy Declaration Page AA004*) shows that \$78,204.28 was

- deposited into CASH bank accounts, or a
- personal check was used to pay for business expenses or
- MasterCard paid for fringe expenses.

The MasterCard was paid by Karron personally, and as such became source Co-Funding, conserving startup cash. Here is a summary of program expenses that were paid for by Karron's funding in this fashion, viz:

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A/C No.	Account Name	Total Co-Funding	NCR Exp Reimb	Out of Pocket	Master-Card	In-Kind Equipment	Check to Bank	Check to Vendors
1010	NCR Check	\$ 207.51	\$ 207.51					
1010	DB Karron Check	\$ 3,000.00					\$ 3,000.00	
6000	Accounting	\$ 500.00						\$ 500.00
6010	Auto	\$ 301.16		\$ 194.15	\$ 107.01			
6019	Books	\$ 410.67			\$ 410.67			
6020	Communications	\$ 1.00		\$ 1.00				
6040	Computer Installation	\$ 689.23			\$ 689.23			
6050	Conference	\$ 300.00			\$ 300.00			
6053	Dues & Subscription	\$ 91.06			\$ 91.06			
6060	Employee Benefits	\$ 36,112.55		\$ 30.00	\$ 18,787.55			\$ 17,295.00
6120	Miscellaneous	\$ 147.01			\$ 147.01			
6130	Office	\$ 357.06			\$ 357.06			
6175	Postage & Delivery	\$ 31.35		\$ 31.35				
6178	Repairs	\$ 248.10		\$ 75.00	\$ 173.10			
6330	Research & Development	\$ 32,114.25			\$ 2,114.25	\$ 30,000.00		
6349	Stationery	\$ 191.02			\$ 191.02			
6370	Travel	\$ 3,502.31		\$ 1,134.32	\$ 2,367.99			
	Total	\$ 78,204.28	\$ 207.51	\$ 1,465.82	\$ 25,735.95	\$ 30,000.00	\$ 3,000.00	\$ 17,795.00

Table 6 Karron Co-Funding For Year One

(31) Total Project Cost

The project total cost was estimated by Karron to be \$2,110,400 in the Gate 4 paperwork.⁹⁷ The Total Project Cost was estimated at one point in the proposal process as costing a total \$2,114,500 with \$2,000,000 coming from ATP, and the balance coming from CASI, and indirectly Karron.⁹⁸ The projected CASI cost was some \$114,500. *Karron Decl. Exhibit 8. GX31* .

(32) Project Summary Cost Figures

The ATP project was co-funded and over funded by the Defendant from Oct 1, 2001 through July 1, 2003 that it was Federally Funded. It actually ran through Dec 31, 2003 out of Karron's pocket.

⁹⁷ GX10, Karron Decl. Ex. 14, Page 3.

⁹⁸ *Ibid.* Dunlevy Decl. Exhibit BAC-301.

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- The total cost of the project is **\$1,524,264**(Budget Line Item L), of which the
- Federal Share is **\$1,345,500** (88.68%) (Budget Line Item I) and the
- CASI contribution was **\$178,764** (11.32%) (Budget Line Item H and K). *Dunlevy Decl. Karron Decl. Exhibit 17.*

11. First Year Quarterly Spending

SF269A Review						
Corrected Figures		Q1	Q2	Q3	Q4	x sum
a	Total Outlays	\$ 258,320.00	\$ 190,036.00	\$ 214,071.00	\$ 223,545.00	\$ 885,972.00
b	Recipient Share of Outlays	\$ 41,682.00	\$ 1,365.00	\$ 17,053.00	\$ 18,104.00	\$ 78,204.00
c	Federal Share of Outlays	\$ 210,000.00	\$ 240,000.00	\$ 140,000.00	\$ 210,000.00	\$ 800,000.00
d	Total Unliquidated Obligations	\$ 6,638.00	\$ (51,329.00)	\$ 57,018.00	\$ (4,559.00)	\$ 7,768.00
	b+c+d	\$ 258,320.00	\$ 190,036.00	\$ 214,071.00	\$ 223,545.00	\$ 885,972.00
	Zero Check(b+c+d-a)	\$ -	\$ -	\$ -	\$ -	\$ -
	Original Date Signed	1/31/2002	4/21/2002	7/12/2002	10/28/2002	\$ 149,660.00
a	Total Outlays	\$ 219,573.00	\$ 188,203.00	\$ 208,727.00	\$ 212,977.00	\$ 829,480.00
b	Recipient Share of Outlays	\$ 9,573.00	\$ 8,214.00	\$ 8,727.00	\$ 2,979.00	\$ 29,493.00
c	Federal Share of Outlays	\$ 210,000.00	\$ 180,000.00	\$ 200,000.00	\$ 210,000.00	\$ 800,000.00
	Over Cofunding	\$ 48,320.00	\$ (49,964.00)	\$ 74,071.00	\$ 13,545.00	\$ 85,972.00

Table 7 Project spending for First Year by Quarter cast in SF269A form.

This chart is the CASI-ATP spending by quarter for the first year.⁹⁹ The co-funding exceeded the spending except for Q2. The overall co-funding exceeded the ATP funding by the end of Year 1 by \$85,972, well in excess of the required year 1 co funding requirement called out in the budget of %4.57, or \$30,500. The original SF269A were not accurate, but the error was not to the harm of ATP, but understated CASI cofunding by \$48,711.00.

12. Equipment In Kind Contribution

Under ATP specific statute companies are encouraged to use their pre-existing equipment whenever possible, and not spend ATP funds to buy new equipment where pre-owned equipment can be used. As such, CASI is entitled to a \$30,000 in-kind contribution at the start of the project for already owned computer equipment.

⁹⁹ Karron Decl. Exhibit 17-21 contains these figures in restated SF269A Short Forms

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Vendor	Description	Fair Market Value	Invoice
LAKE DSP	Rackmount PC with DSP (Digital Signal Processor)	\$ 40,363.00	\$ 51,599.98
SGI	Indigo x2	\$ 900.00	\$ 5,000.00
SGI	Indigo 2 Extreme Graphics	\$ 1,200.00	\$ 5,000.00
SGI	SGI Software Developer Software Bundle	\$ 10,000.00	\$ 10,000.00
WACOM	Large Pressure Sensitive Digitizer Pad	\$ 1,200.00	\$ 1,200.00
Polhemus	Navigation 3Draw Pro	\$ 5,200.00	\$ 5,200.00
Polhemus	Navigation additional stylus	\$ 500.00	\$ 500.00
Polhemus	Navigation Insidetrack Digitizer	\$ 1,495.00	\$ 1,495.00
American Media Pro	Server Class Dual Xenon PC	\$ 5,000.00	\$ 5,000.00
Seagate	15 Disk RAID	\$ 5,000.00	\$ 12,000.00
	<u>TOTAL</u>	<u>\$70,858.00</u>	<u>\$96,994.98</u>

Table 8 Chart of CASI Equipment Used in NIST ATP DMT Project

CASI brought significant In-Kind value to the project, conservatively valued here at \$ 70,858.00. These figures were proposed to NIST ATP following project suspension to negotiate refund and new co-funding with grants administrator Marilyn Goldstein. There was plenty of reserve value to give CASI credit for this contribution. The value here is well in excess of the 30,000 in-kind credit claimed here at the start of the project¹⁰⁰. The base of the allowable co-funding in-kind valuation is the CASI/Karron of Budgeted contribution of \$110,000.

**IN KIND Contribution of Equipment was ignored by 2 auditors -
Hayes and Riley. Amount of Co-Funding is \$30,000.**

Per HABAC 581 Combination Sheet		
HABAC 604	Amex Software	3,294.54
HABAC 604	Amex Tech	349.55
HABAC 604	Amex Tools	387.25
HABAC 603	Amex Computer Installation	3,944.91
HABAC 603	Amex Equipment	10,802.85
HABAC 605	NIST ATP Computer Installation	3,684.23
HABAC 606	NIST ATP Paypal	329.75
		<u>22,793.08</u>

Table 9 In Kind

¹⁰⁰ 15 CFR §295.2 ... ATP restricts the total value of in-kind contributions that can be used to satisfy the cost share by requiring that such contributions not exceed 30 percent of the non-federal share of the total project costs

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13. Accounts Payable is an In Kind Contribution

GAAP (Generally Accepted Accounting Principles) uses accrual basis accounting. In this basis there are accounts receivable (owed to the CASI) as well as accounts payable (monies CASI owes to their suppliers). CASI owed Silicon City \$16,532.55 from 5/31/02. CASI also owed Silicon Graphics \$30,726.15 from 1/9/02. Since these two companies have been CASI suppliers since 1996 they were not overly concerned about being owed money and being paid later than was customary.

To Recap:

	Per Hayes HABAC 593	223,503.00	Audit Report
	Per HABAC 624-626	212,884.59	Cash Paid to Vendors
	Per HABAC 625	16,532.55	A/P Silicon City
	Per HABAC 625	30,726.15	A/P Silicon Graphics
HABAC 607	Total per HABAC 626	260,143.29	A/C 6330
HABAC 607	Per HABAC 627	30,000.00	In Kind
	Per HABAC 581	22,793.08	See Schedule Below
	Total costs incurred by CASI HABAC 581	312,936.37	
	Difference	89,433.37	

Table 10 Project Accounts Payable¹⁰¹

(33) Quick Observations that confirm co-spending

- 18) Total Spending is greater than the Governments Contribution
- 19) Total direct spending is greater than the Governments Contribution
- 20) Source of Funds is Karron Salary and Credit

(34) Substantive Testing of Co-Funding

Dunlevy conducted substantive¹⁰² testing to validate Karron's co-funding. Substantive testing of the expense of fringe benefits also proves the inherent and corresponding co-funding by Karron..

¹⁰¹ Dunlevy Decl AA005 Lower

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Therefore, the drumbeat of 'no co-funding in the trial testimony is provable false'. That the court concluded that there was no co-funding is a material error. This error should have been effectively challenged by Rubinstein. Rubinstein failed to engage the forensic experts and let this error persist to the client's detriment.

21) Hayes and Riley Audit substantial agreement on Fringes element requires acceptance of Co-Funding

Funding for Medical Fringes was accepted and was paid by Karron, not by NIST ATP, and must be construed as co-funding.

22) Salary/Wage Advance Loans were repaid, but bulk of loan proceeds went to co-fund project

14. There is sufficient co-funding that even without rent, Karron's contribution above minimum co-funding pays for the rent.

The two arguments in Grounds One is that the rent was reclassified as Salary. There is sufficient co-funding that even without this reclassification the grant is sufficiently co-funded to meet the budget obligation.

15. Whose idea was this to pay for co-funding this way?

Hayes calculated and executed the no-pay paychecks based on the contemporaneous e-mail traffic. DX FFF Hayes did the co-funding by MasterCard and credit card payments. Hayes tracked the co-funding by accounts payable. ATP allows any accounting system as long as it is consistent. Hayes was creating new quad entry books; she apparently switched to a cash basis

¹⁰² Substantive testing are those activities performed by an auditor during the substantive testing stage of the audit that gather evidence as to the completeness, validity and/or accuracy of account balances and underlying classes of transactions. Substantive audit procedure is a direct test of a financial statement balance designed to detect material misstatements at the assertion level. Substantive procedures comprise tests of details (classes of transactions, account balances, and disclosures), and substantive analytical procedures.

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without management consent. She included it in her audit figures without realizing it was a double booked entry, once as fringe, the other as contribution.

16. WILLFULL IGNORANCE BY PROSECUTION OF KARRON CONTRIBUTION

The proof of Karron/CASIs' funding is presented in the Affidavit of Dunlevy. Illustrated above are some quick and simple substantive tests of the reality of the co-funding. . Various tests that show Karron / CASI Co-funding in elements of the Hayes and OIG figures within themselves. The main example is given in GX114 above. Other examples are fringe funding for Karron accepted by Hayes and the OIG, where the source of funds was Karron's personal funds.. Acceptance of the fringes necessitates the acceptance of the co-funding, yet this was resolutely ignored by the Prosecution.

Every payment accepted by the OIG that was not paid directly from NIST ATP source funds must be paid by Karron/CASI. The source of funds must be counted as co-funding. These kinds of errors independent accountants would make. These contradiction means the acknowledgement of co-funding was suppressed against accounting and logic standards.

As time went by, and under pressure from the OIG, reclassifications and allowances negotiated by the Defendant were forgotten, and the made-up audit results and misunderstandings were accepted as replacements for fact.

What started out as negotiated allowances for Internet, telephone, co-funding in kind, salary allowances in lieu of rent, in-kind and cash co-funding became willful disobedience and criminal, fraudulent and for treble punitive penalties.

What evidence remains of these negotiated understanding? Where are the supporting documents? The implicit evidence of the rent reclassification survives in plain sight, like fossils in exposed shale, in the corpus of trial records

The question of other allowances and allocations that have been suppressed is now credible in light of the above evidence. Supporting documentation is missing or suppressed by the Prosecution.

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17. Reclassification of Rent to Personnel Line Item class Vitiates Government Witness Testimony on Rent

The Jury was given a question of guilt to answer beyond a reasonable doubt. The jury decided the Defendants' guilt on the trial testimony, and exhibits. They gave particular weight to evidence they called back during their brief deliberations¹⁰³. Specifically read back of the cross Examination of Benedict and a 'blow-up' copy of GX114¹⁰⁴.

It was not the Jury's job to check the arithmetic and find counting errors in the exhibit. The jury found as fact that the exhibits were true. Nevertheless, the jury was plainly in error because the evidence was in error and it is not a harmless math error. It was not the jury's job to verify the arithmetic. It is not the Jury's job to verify that the exhibits author did not count the same costs multiple times. That job belongs to the Prosecution, and the Defense counsel. They both clearly failed to perform their duty in this case. The Prosecution had a duty to the truth, not winning. The Defense counsel failed to challenge the exhibit as a true and correct exhibit, free of double counts. The court noticed this at Sentencing¹⁰⁵. At the very least, the exhibit should be auditable and verifiable. The authors should show their work, they should show how they arrived at these figures. They did not. There is no way to reconstruct or reverse engineer the exhibit. The reason they did not was because they were attempting to hide exculpatory facts.

¹⁰³ Trial Transcript Page 1371

18 THE COURT: Maybe I better read it[the note from the jury] into the record.

19 This is Court Exhibit 5, received from the jury at

20 3:12, and signed by Ms. Young. It says.

21 "1. Bob Benedict's testimony.

22 "2. Number 110.

23 "3. Number 111.

24 "4. 114

25 "5. 115.

Trial Transcript Page 1371

1 "6. Original budget.

2 "7. Revised approved budget.

3 "8. Nonapproved subsequent budget revisions."

¹⁰⁴ Trial Transcript Page 1377

1 MR. KWOK: OK. Your Honor, I think we have an

2 agreement. The transcript is redacted with the approval of

3 Mr. Rubinstein and the government, and I think we also should

4 send in the blow-ups, because they are the actual exhibits,

5 these big boards, Exhibits 114 and 115.

6 THE COURT: I sent in 114 and 115.

¹⁰⁵ Sentencing Transcript Page 1. The COURT:

1 So I have difficulties.

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The jury was left to take on faith that the exhibit was correct. Had the jury known the exhibit double counted the Rent, and that the rent has been implicitly reclassified from an unallocable indirect cost to allowable personnel cost they would have not reached the guilty verdict they did. Had they realized that the ATP had explicated allocated the power and utilities in their audit workpapers, and that this evidence was their attention, they would not have reached the verdict that they did.

The entire issue of Karron's intent would have been different, had it been known that despite all of the naysaying witness testimony, the program did make the requested allocations before the OIG intervened¹⁰⁶ and short-circuited budget and audit negotiations.

The exculpatory supporting documentation for the reclassification must be brought forward, even at this late date. That is not brought forward during the trial is grounds for discovery. That this exculpatory supporting documentation was not disclosed during the trial is a *Brady v Maryland* rule violation.

The meaning of this failure has far-reaching implications. It corroborates other hints that NIST ATP was struggling to accommodate Karron's requests. The *Declaration of Eisen*, a transcript of the last ATP proposers' conference in 2007, shows it was the policy of ATP to work hard to accommodate its grantees; it was loathe to say "no". It shows that ATP had in fact accommodated Karron before the project was suspended. The implicit reclassification it reveals that the NIST ATP had explicitly reclassified payments made to Karron originally classified as rent into Wages/Salary, moving it from an indirect cost line item K into a Personnel Line item A. There must be more explicit evidence to support this previously unnoticed implicit exculpatory reclassification.

This exculpatory information was not brought forth by the Prosecution at trial. Had this and the other reclassifications' and allowances made by NIST ATP, and alluded to in the Discovery and Trial Transcript been made plain and fully known to the Jury, there is a significant probability they would have not rendered the verdict they had.

¹⁰⁶ Trial Transcript Page 811, Riley – cross, RUBINSTEIN Questioning, RILEY Answering:
20 Q. And what happened here is that the special agents jumped in
21 on this back in 2003, right?

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The entire issue of knowing misappropriation is called into question because Karron had good cause to "know" that the allowances would be granted. They in fact had been granted.

(35) Conclusions

1. Government numbers in GX114 are at best negligent with hostile intent, at worse intentionally fraudulent

2. Government exhibit GX114 cannot be considered reliable enough to support a reliable jury verdict

3. The government's forensic exhibit GX114 should have been attacked defense counsel and impeached.

4. Karron's first year contribution was \$78,204.00 (SF269A Line (b) Recipient Share of Outlays)

5. In light of these arguments and forensic proofs, the verdict must now be set aside.

(2) Ground Two: (Actual) The grant funds were not spent beyond the statutory flexibility limits.

NIST ATP projects were designed to be very flexible to accommodate the changing requirements.^{107 108}

...cumulative transfers of funds of an amount above 10 percent of the total award must be approved by the Grants Officer in writing. This allows the Recipient to transfer funds among approved direct cost categories when the cumulative amount of such transfers does not exceed 10 percent of the current (last approved) total budget.¹⁰⁹

The 'last' total budget was \$2,114,500¹¹⁰, to \$2,111,000¹¹¹. That means that, by the above authority, there was a permitted shift of as much \$211,450 between Object Class Categories A through G. In the trial, the base of the variation was variously cited as \$80,000^{112 113 114 115},

¹⁰⁷ Eisen Declaration Page 6,

¹⁰⁸ Eisen Declaration Page 10 A: [STANLEY] I would take one more crack at that. One of the things I pride myself on in this program and with my colleagues is that: We try not to be too bureaucratic.

¹⁰⁹ Government Exhibit GX3; DEPARTMENT OF COMMERCE FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS. Section 04 Budget Changes b.

¹¹⁰ Government Exhibit GX31 Undated.

¹¹¹ Government Exhibit GX33, Hand Annotated 12/2/02

¹¹² Trial Transcript Page 190, Line 23: Rubinstein Questioning, Lide Answering: Q. Now, in the budget you're allowed to move any item --increase it by 10 percent, is that correct? A. If you decrease something else by the equivalent amount, 1 and if it's within 10 percent of that year's budget. So cumulatively over year one, only \$80,000 could have been moved without prior approval.

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incorrectly based on the only governments contribution of \$800,000. This ignored Karron/CASI's contribution of \$85,972¹¹⁶, and a total first year spending was \$885,972, providing a change base of plus and minus \$88,597, a difference of \$131,450. As stated in the¹¹⁷ spitz

The main inculpatory evidence cited by the Government at trial were the testimony of Gurfein, Benedict, Spring, and Government Exhibit 114. The Main point of Ground 2 is that the true change base is \$211,450, not \$80,000, and it is a transfer of Plus to Minus, meaning total variation is \$422,900, meaning 211,450 may come out of and into existing categories A-G. The main shift was the increase in Equipment and Decrease in Contractors of some 100K.

(1) Testimony of government witnesses Gurfein, Benedict and Spring, former CASI employees and consultants.

The theme of their testimony was that they repeatedly told the Defendant not to make certain expenditures because they were not allowed under ATP Statute and Rules, and as such were unauthorized and therefore illegal. Witnesses used the same language and semantics in their sage admonishments to the Defendant. This laid the foundation for the "knowing" requirement 18 USC §666(a)(1)(A), implying that the Defendant 'knowingly'¹¹⁸ broke the law.

Q. Can you -- in other words, they doesn't utilize the 10 percent, the ten million -- the two million rather?

A. No. It's on a year-to-year basis.

Q. And is that specified in some of this material?

A. Yes. I believe it's actually in the special award condition, which I can try to find, but that's articulated very clearly in -- at all these meetings and kickoffs and proposers conferences, et cetera. It could also be in Exhibit 4 in those slides.

[Lide is incorrect. She was referring to Government Exhibit GX4, Page 7 which contradicts GX3 (above), which clearly contradicts her testimony]

¹¹³ Sentencing Transcript Page 30, Line 15 "THE COURT: You got this 80,000 figure that you can 16 move around. But that seems to me is already taken care of when you look at the overdrawn equipment and the overdrawn 18 materials and supplies. That takes care of the 80,000 pretty well.

¹¹⁴ Sentencing Transcript Page 37, Line 5: THE COURT: But you are allowed the \$80,000, but then 6 the \$80,000 has been used up.

¹¹⁵ Sentencing Transcript 58 Line 17: THE COURT: In that tabulation I agree with you, that the entry includes salary and loans as they calculated it, but it doesn't make much difference because the 80,000 odd dollars that the defendant was entitled to redistribute are incorporated in the equipment --

¹¹⁶ See Table 7 Project spending for First Year by Quarter cast in SF269A form

¹¹⁷ Government Exhibit 62, Final Audit Rebuttal Appendix III Page 14 of 38, A shift of \$120,000 from Personnel to Equipment

¹¹⁸ But not Fraudulently. See *mens rea* discussion in Review Standards.

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(2) Had Karron Funds been used to make these payments would have this been a crime?

A pivotal aspect of this case is the nature of the ‘illegal’ payments made under 18 USC §666(a)(1)(A). Congress enacted 18 USC. § 666 to protect the integrity of the vast sums of money distributed through Federal programs. Section 666 is designed to facilitate the prosecution of persons who steal money or otherwise divert property or services from state and local governments or private organizations that receive large amounts of Federal funds.¹¹⁹

- Clearly, assuming, *arguendo*, if these payments were made by the Karron using personal funds they would not have been illegal under this program and could not serve as grounds to convict the Defendant.
- Alternatively, also assuming, *arguendo*, if these payments had been expressly allowed by the NIST ATP sponsor, they would not have been illegal and grounds to convict the Defendant.

6. Misapplication of funds and source of funds

Payments for clearly illegal items, such as illegal drugs, pornography, or weapons would therefore be illegal without regard to the source of the funds. Payments made, using federal funds for otherwise legitimate costs, without authorization, is also illegal as was the holding under *US v Urlacher*. Payments by Karron owned funds of legitimate costs is obviously legal. Payments funded by Karron post tax earned salary are clearly Karron funds. Therefore, the nature of the payments, in and of themselves, by themselves, in isolation, is not by its nature illegal. What makes these payment illegal is:

- the **source of funds** used to make these payments and
- the **budget and the budget flexibility standards** of the funding agency that granted funds

¹¹⁹ US Attorney Manual 9-46.000 PROGRAM FRAUD AND BRIBERY

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to make the project succeed. The funding agency required co-funding and the CASI/Karron paid indirect costs (Budget line item K). Is it possible that co-funding can be interpreted co-mingling ? This is discussed below.

(3) Support from Cost Principles

The Federal Cost Principles on Cost Sharing gives the applicable general principles for the application of cost sharing

- (1) Are verifiable from the recipient's records.
- (2) Are not included as contributions for any other federally-assisted project or program.
- (3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.¹²⁰

7. Application of Cost Principles: Power

Clearly, power and other utilities are necessary and reasonable. The increment that can be attributed to the program is clearly allocable to the project. The records exist and are verifiable. As there was no other source of funding other than Karron's Wages/Salary, the program decided to help, instead of destroy. The test of 'necessary and reasonable for proper and efficient accomplishment of project' is without power the project would halt. This is the *sine qua non* test; without the particular element, the project cannot continue.

8. Application of Cost Principles: Rent

Rent is a payment to Karron, and is almost indistinguishable from budget line A, Personnel wages and salary, especially because it is a payment to Karron, and because Karron deferred wages because of an advance loan.

9. Application of Cost Principles: Site Preparation

Site preparation construction is *sine qua non* to use the equipment the grant funded. Clearly, as argued at trial, there was no benefit to Karron to destroy the apartment. The court argued that Karron may have gold-plated the equipment. This argument ignores the fact that this was high end professional custom built computer equipment for its day. By that argument, the

¹²⁰ Office of Management and Budget (OMB) Circular A-110 Section 23

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purchase of anything other than cheap consumer grade computers could be considered gold plating; but the use of cutting edge computers would have met the Cost Principles standards, there for the installation of this equipment also meets the Cost Principles. By analogy, shipping and taxes are *sine qua non* parasitic costs of the equipment and are also well accepted by the Cost Principles. Therefore, site preparation can be considered as part of the parasitic co-costs of putting high end professional computers into service of the project.

10. Excess co-funding created a buffer

There are reasonable arguments for cost sharing allocability of many of these costs, and if the arguments are rejected, the project is sufficiently overfunded by Karron that Karron funds can be classified as the source of funds. Apparently, this was part of budget negotiations and assumed by the program. Someone else stepped in and suppressed these understandings and criminalized these payments.

(4) Co-Mingling or Co-Funding ?

The court cited co-mingling of funds as a complicating issue in the tracing of funds.¹²¹

¹²²As we can see from the budget forms¹²³ and the kickoff slides¹²⁴ there was an expectation and

¹²¹ Trial Transcript Page 942

MR. EVERDELL: ... I

23 think the law is clear that you don't actually need

24 to trace the funds to the actual purchases, so that if they

25 were commingled with actual separate CASI funds, we could still

Trial Transcript Page 943

1 prove that he spent -- improperly spent CASI money. However,

2 in this case, because all the funds are ATP funds, it doesn't

3 really raise an issue.

¹²² Trial Transcript Page 1203, Mr. RUBINSTEIN:

21 "The fourth element the government must prove beyond a

22 reasonable doubt is that the money was intentionally

23 misapplied."

24 MR. KWOK: Your Honor --

25 MR. EVERDELL: Your Honor, this is starting to sound

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1 suspiciously like a tracing requirement. This element simply

2 talks about where the money was housed, where the funds that

3 came in were put. They were put in CASI's bank accounts. The

4 evidence at trial was ample. They all went into CASI's bank

5 accounts, the company bank accounts. There is no tracing

6 requirement under the Second Circuit law.

¹²³ GX10b, GX114, GX 031, to cite only a few.

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requirement that the proposer provide funds to match the government funds by a certain percentage. This was observed by Benedict in his direct testimony, only he termed it commingling¹²⁵. Benedict choose to ignore the 4 CASI checking accounts Karron had setup in an attempt to get the CASI bookkeepers to respect the segregation of funds on which to draw checks upon for payments.¹²⁶

The nature the illegal payments were more precisely determined by the Court at sentencing were all for otherwise legitimate indirect costs, specifically¹²⁷ as

- 1) Rent (to Karron),
- 2) utilities (telephone, cable Broadband data communication)
 - a. site preparation construction (Bata Bintor) and
 - b. cleaning / clerical contractor Ferrand

These payments were not illegal had they been made with Karron/CASI funds. The Defendants' argument is these were specifically allowed. The exculpatory evidence of these allowances was suppressed .

(5) Bad Accounting: by Karron of Hayes/Spring/Benedict ?

¹²⁴ GX 4, page 13, showing an illustration of three pots. Funds being poured from two pots into a third pot. The leftmost pot is labeled "ATP Funds". The rightmost pot is labeled "Cost Share". The two pots are shown contributing to a third pot labeled "Total ATP Project Budget", from which program costs are funded out of. There is a cryptic legend on the page saying "Cost Sharing or matching means that portion of project or program costs not borne by the Federal Government."

¹²⁵ Trial Transcript 973, Benedict Direct:

15 A. I noticed that all of the funds were commingled, which is
15 not allowed by ATP.

16 MR. RUBINSTEIN: Objection. Move to strike, your
17 Honor.

18 THE COURT: Disregard the part "which is not allowed
19 by ATP."

20 Q. Just to clarify. You said you noticed the funds were
21 commingled, is that right?

22 A. Yes, sir.

¹²⁶ Trial Transcript Page 1052, Benedict cross by Rubinstein.

8 Q. But isn't it a fact the rent check was written from a CASI
9 Inc. account which was a green check?

10 A. All of the money that was in all of the accounts was NIST
11 money, so the color of the check didn't matter.

¹²⁷ Sentencing Transcript Page 91, the COURT:

7 It's clear to me that there was an intentional
8 misapplication of the rent money. The defendant was told time
9 and time again not to use the rent funds for rent or for
10 utilities. That's what the record here substantiates.

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Bad accounting was attributed to Karron's meddling and obstructing the proper and professional bookkeeping of Hayes. Indeed this was a foundational element at the beginning of the trial. The experts were going to testify that Karron was cooking the books. This did not hold up during trial. It was Hayes who made a mess of things to hide her meddling and theft of payroll.

(6) Check Bouncing when Bookkeeping went offsite in Year 2

Karron gave Hayes everything she wanted. She wanted bookkeeping to go offsite. Karron granted it. Karron ended up having to run to the bank to get refunds of check bouncing fees. Here is a chart of check bouncing fees through the two years the project ran:

Date	Days	Account	Memo	Bank Fee
10/1/2001	0	project start		
8/14/2002	317	CASI INC CHASE CHK 96-65	Insufficient Funds Service Fee	(\$25.00)
9/5/2002	339	CASI INC CHASE CHK 96-65	Overdraft Fee Adjustment	\$25.00
11/19/2002	414	CASI INC NIST ATP 35-65	Insufficient Funds Service Fee	(\$50.00)
11/19/2002	414	CASI INC NIST ATP 35-65	Insufficient Funds Service Fee	(\$30.00)
11/25/2002	420	CASI INC NIST ATP 35-65	Overdraft Fee Adjustment	\$30.00
12/11/2002	436	CASI INC NIST ATP 35-65	Insufficient Funds Service Fee	(\$135.00)
12/12/2002	437	CASI INC NIST ATP 35-65	Overdraft Fee Adjustment	\$135.00
3/17/2003	532	CASI INC CHASE CHK 96-65	Insufficient Funds Service Fee	(\$25.00)
3/26/2003	541	CASI INC NIST ATP 35-65	Insufficient Funds Service Fee	(\$60.00)
3/27/2003	542	CASI INC NIST ATP 35-65	Insufficient Funds Service Fee	(\$60.00)
4/10/2003	556	CASI INC NIST ATP 35-65	Overdraft Fee Adjustment	\$60.00
4/17/2003	563	CASI INC NIST ATP 35-65	Bank Miscellaneous Credit	\$60.00
5/1/2003	577	CASI LLC CHASE CHEK 31-65	Insufficient Funds Service Fee	(\$30.00)
5/2/2003	578	CASI LLC CHASE CHEK 31-65	Insufficient Funds Service Fee	(\$30.00)
5/7/2003	583	CASI LLC CHASE CHEK 31-65	Overdraft Fee Adjustment	\$30.00
5/7/2003	583	CASI LLC CHASE CHEK 31-65	Overdraft Fee Adjustment	\$30.00
6/27/2003	634	CASI LLC CHASE CHEK 31-65	Bounce Charge	(\$30.00)
7/11/2003	648	CASI INC NIST ATP 35-65	Insufficient Funds Service Fee	(\$30.00)
7/15/2003	652	CASI INC NIST ATP 35-65	Overdraft Fee Adjustment	\$30.00
7/9/2003	646	CASI LLC CHASE CHEK 31-65	Bounce Charge	\$30.00
11/18/2003	778	CASI LLC CHASE CHEK 31-65	Insufficient Funds Service Fee	(\$75.00)
11/19/2003	779	CASI LLC CHASE CHEK 31-65	Overdraft Fee Adjustment	\$75.00

Table 11 CASI Program Check Bounces Year 1 and 2

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We can see that no checks bounced in the first three quarters or so of the project (days 0 to 300), and when the bookkeeping went offsite to the Jackson Group office, checks started bouncing en masse. The stars below the horizontal axis are bounce fees charged (negative debits) and the stars above the axis (positive credits) are refunds that Dr. Karron obtained by running to the bank and negotiating refunds. Who is making a mess of program accounting ?

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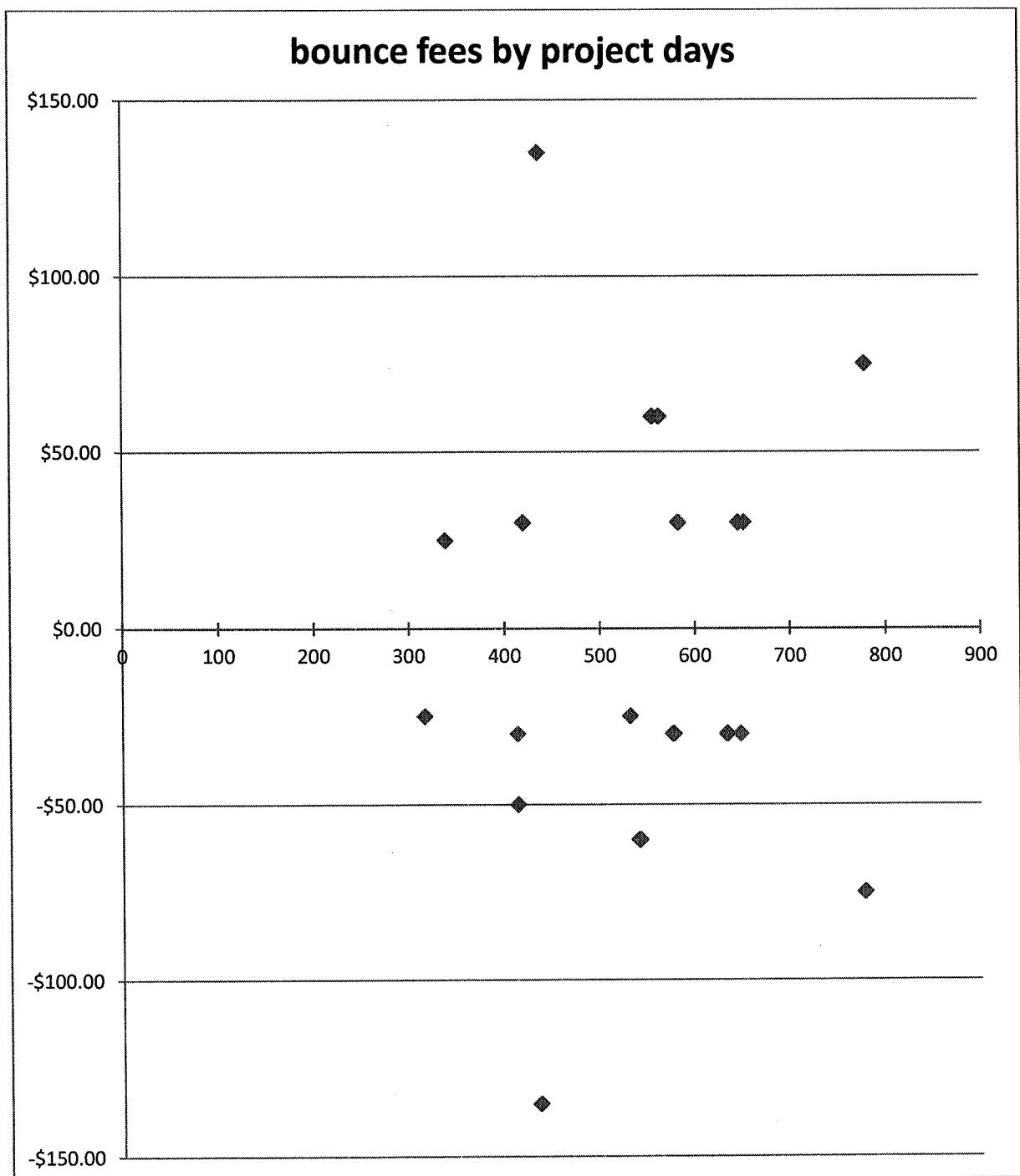


Figure 3 Scatterplot of Bounce Fees Project Year One and Two

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11. Payroll Taxes went missing when bookkeeping went offsite in year 2

Year two payroll taxes went missing. The IRS has been investigating since then. Civil liens have been filed against Karron.¹²⁸

(7) Quad entry bookkeeping for a small project was featherbedding the project

Hayes colluded with Spring and the Jackson Group to setup an extraordinary expensive quad entry bookkeeping system¹²⁹. Karron, as an academic manager, did not realize how inappropriate such a system was to manage and operate. From the extraordinary amounts of billing Jackson Group's contractor Spring was submitting, it became clear this project was becoming 'featherbedding'¹³⁰ at its worst. Spring never did succeed in creating these 'new books' because they required so much work.¹³¹ Later, Spring would testify that it was Karron's meddling that cause him not to complete this Sisyphean task¹³². Later that year in December 2003, the successor auditor Spitz handily reconciled and created new books for the CASI re-audit, which Riley gave a positive exit interview.

(8) The Jackson Group billing goes out of control

¹²⁸ Declaration of Karron Exhibit <<CITATION>>

¹²⁹ Dunlevy, the long-term CASI forensic bookkeeper, that this novel system was actually a kind of "Fund Accounting" used by governmental agencies and was completely inappropriate for small businesses and for implementation on Quick Books. Each line item required 4 counterbalancing entries Because of this this project was doomed to extraordinary cost and failure.

¹³⁰ Featherbedding (also called make-work) is the practice of hiring more workers than are needed to perform a given job, or to adopt work procedures which appear pointless, complex and time-consuming merely to employ additional workers.

¹³¹ Trial Transcript Page 472 – Riley – direct

3 When I arrived, the new books weren't completed yet,

4 so they were going to be completed the next day so I waited

5 till the next day.

6 The -- I used the records that they provided and,

7 including Joan Hayes, what Joan Hayes had provided to come up

8 with the numbers for this. I did not take Joan Hayes' report

9 and copy the numbers to come up with this. [**this is precisely wrong, because she copied Hayes numbers with their tell tail errors**]

Trial Transcript Page 976, Benedict - direct

9 A. Not before I left. They were working on it[new books], but they never

10 completed it.

¹³² In mythology Sisyphus was a king punished by being compelled to roll an immense boulder up a hill, only to watch it roll back down, and to repeat this throughout eternity. The word "sisyphean" means "endless and unavailing, as labor or a task"

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The total number of CASI and CASI NIST ATP program checks was 1425 for the period of October 1, 2001 through Sept 30, 2003. This is period of 24 months CASI wrote an average number of 60 checks a month. This is not an overwhelming number of checks. For this period the Jackson Group billed \$26,217 to book these checks, or a cost of \$18 per check. They never finished. Spitz and Greenstein managed to reconcile and book these checks and the Credit Card and Karron's personal contributions in one week and prepare for the second OIG audit for \$14,000.

Register Report 2
10/1/2001 through 12/31/2003

Date	Account	Num	Description	Memo	Category	Tag	Clr	Amount
8/8/2002	Ken Jackson G...02-CA-01	Ken Jackson			ATP_OTHER...	NIST_AT...	c	-1,360
8/27/2002	Ken Jackson G...02-CA-02	Ken Jackson			ATP_OTHER...	NIST_AT...	c	-920
9/17/2002	Ken Jackson G...02-CA-03	Ken Jackson			ATP_OTHER...	NIST_AT...	c	-1,000
9/27/2002	Ken Jackson G...02-CA-04	Ken Jackson			ATP_OTHER...	NIST_AT...	c	-1,050
10/10/2002	Ken Jackson G...02-CA-06	Ken Jackson			ATP_OTHER...	NIST_AT...	c	-1,990
10/11/2002	Ken Jackson G...02-CA-05	Ken Jackson			ATP_OTHER...	NIST_AT...	c	-1,680
11/16/2002	Ken Jackson G...02-CA-07	Ken Jackson			ATP_OTHER...	NIST_AT...		-2,230
12/8/2002	Ken Jackson G...02-CA-08	Ken Jackson			ATP_OTHER...	NIST_AT...		-1,037
1/26/2003	Ken Jackson G...03-CA-01	Ken Jackson			ATP_OTHER...	NIST_AT...		-1,120
2/14/2003	Ken Jackson G...03-CA-02	Ken Jackson			ATP_OTHER...	NIST_AT...		-1,070
3/6/2003	Ken Jackson G...03-CA-03	Ken Jackson			ATP_OTHER...	NIST_AT...		-790
4/23/2003	Ken Jackson G...03-CA-04	The Jackson G...			ATP_OTHER...	NIST_AT...		-1,030
5/8/2003	Ken Jackson G...03-CA-07	Ken Jackson			ATP_OTHER...	NIST_AT...		-2,530
5/10/2003	Ken Jackson G...03-CA-05	Ken Jackson			ATP_OTHER...	NIST_AT...		-1,830
5/22/2003	Ken Jackson G...03-CA-08	Ken Jackson			ATP_OTHER...	NIST_AT...		-1,790
5/25/2003	Ken Jackson G...03-CA-06	Ken Jackson			ATP_OTHER...	NIST_AT...		-2,160
6/30/2003	Ken Jackson G...03-CA-09	Ken Jackson			ATP_OTHER...	NIST_AT...		-1,130
7/31/2003	Ken Jackson G...03 CA 11	Ken Jackson			ATP_OTHER...	NIST_AT...		0
8/17/2003	Ken Jackson G...03 CA 10	Ken Jackson			ATP_OTHER...	NIST_AT...		-900
10/1/2001 - 12/31/2003								-26,217

Table 12 Ken Jacson Billing for Year One and Two

(9) Hayes turns on Karron and causes accounting nightmare to force fees from CASI

The Petitioner can only surmise that Hayes' multiplicity of CASI roles led to the prosecution to withdraw Hayes as an expert witness. Or, as alluded to above, Hayes may have actually committed crimes. Hayes was simply too dirty and vulnerable to Rubinsteins' withering cross-examination. While Rubinstein may have been unable to manage a sprawling white collar

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forensic case like this, he was masterful at the art of cross-examination. He was successful enough at impeaching other Prosecution witnesses so as to convince the Prosecution not to put their lead witness on the stand against him. Was there more exculpatory evidence relative to Hayes that should have surfaced that did not?

(10) Accounting a Mess when usurped by Spring and Hayes

(11) Karron provided co-funding from initial bootstrap loan

The two underlying assumptions made by both the Prosecution and the Defense were that

- The Defendant used ATP funds to pay for Un-allocable/Un-allowed costs; that these costs were not otherwise reclassified into allowed costs.
- The Defendant had not contributed any personal funds to pay for costs.

Rubinstein showed in his cross examination of the Government Auditor Riley that the initial \$75,000 salary advance loans were repaid within 5 months.¹³³ This was accepted by the court.¹³⁴ Rubinstein failed to continue with the forensic analysis to show that the proceeds of the loan, which were personal funds, were used to pay project direct and indirect costs, Budget Line J and K. As the forensic analysis of Dunlevy shows, these costs were overfunded, not underfunded or not funded at all. Therefor the issue of source of funds to pay for Line J was Karron, not ATP.

(12) ATP worked to support their Co-Operative Agreement Awardees

ATP worked hard to grant the requests to make specific variances Karron asked for. It was their stated policy at their proposers meeting in 2007, the proceedings of which are presented as transcribed in the Declaration of Eisen. ATP was loathe to say “no”, and attempted

¹³³ Trial Transcript Page 800, Riley – cross, RUBINSTEIN is Q(Questioning), RILEY is A (Answering)
6 Q. And so if he borrowed \$75,000 in October, within five months he basically would pay that back, correct?
8 THE COURT: Answer, please.

9 Q. 14 times five is 70, correct?

10 A. Yes.

11 Q. And October, November, December, January, February, by the end of February he would have basically paid back the 75,000, correct?

14 A. For the gross, correct.

¹³⁴ Sentencing Transcript Page 7[

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to foster innovators.¹³⁵ There was no documentation of denials. The documentation in support of Karron has gone missing. The ATP had its own political problems. ATP was terminated by an act of Congress in 2008.

(13) Oral Permissions supported by GX114 Analysis in Discovery and Forensic Analysis

That ATP had given permission to Karron for allowances was noted by the Judge in the criminal trial.¹³⁶ Where is the supporting documentation? What was not known at the time of the trial was the OIG had given CASI explicit power allocation in its audit workpapers.¹³⁷ Similarly, the OIG had granted CASI a reclassification of rent(budget line item K, indirect) to payroll(budget line item A, personnel). The implicit reclassification means that at some point the program had explicitly reclassified the rent, and there must be memos, worksheets, e-mail, and other records of the discussion associated. This evidence, which must exist to support the reclassification, was suppressed. Only the OIG forgot to suppress the evidence of that reclassification in its numerical evidence. From this clue, we must call for discovery to find these suppressed exculpatory documents. If they were destroyed, then an inquiry must be made to determine who and how this miscarriage could have happened.

(14) NIST ATP granted Allocation of Power

NIST ATP granted allocation for power. This is despite the contrary testimony of the CASI bookkeeper Spring¹³⁸ and NIST ATP grant specialist Snowden. They maintained that this was not allowable.¹³⁹ Nevertheless, it was allowed. It was later revealed in Riley's¹⁴⁰ and

¹³⁵ Eisen Declaration Page 8

¹³⁶ Sentencing Transcript Page 19

19 THE COURT: It suggests not approved in writing. I

20 have seen that. I agree with that. But it sounds as if it was

21 approved orally.

¹³⁷ Prosecution Criminal Discovery Document Bates Stamped Page 05274, never cited at trial.

¹³⁸ Trial Transcript Page 910; Spring – cross RUBINSTEIN Questioning, SPRING Answering

10 Q. By the way, you also said that you had discussed with Dr.

11 Karron the unallowability of utilities, correct?

12 A. Correct.

13 Q. And, in fact, are you aware of negotiations as to having as

14 an expense deductible from NIST for utilities?

¹³⁹ Trial Transcript Page 256, Snowden – direct, SNOWDEN Answering

20 A. For one thing, they're considered indirect costs, and

21 they're -- indirect costs for us is general and administrative

22 costs like water, electricity, heat, something that ATP and

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Benedict's¹⁴¹ testimony and accepted by the court¹⁴²¹⁴³ over the Prosecutions objections.

Ultimately, NIST ATP would allow ostensibly disallowable costs as revealed in the OIG audit

23 federal funds we do not pay for.

¹⁴⁰ Trial Transcript Page 708ff Riley – cross RUBINSTEIN Questions, RILEY Answering

12 Q. You disallowed utilities, did you not?

13 A. Disallowed utilities?

14 Q. Yes.

15 A. Yes.

16 Q. Are you aware that there were discussions between Dr.

17 Karron and NIST as to whether to allow a portion of the

18 utilities?

19 A. Yes.

20 THE COURT: When? All right.

21 Q. And is it fair to say that you determined that a portion of

22 the utilities should be allowable? [Riley never gave a direct answer to this question]

¹⁴¹ Trial Transcript Page 1057 Benedict - cross, BENEDICT Answering, RUBINSTEIN Questioning

10 A. I don't recall the specific discussions, but I do remember

11 there were, yes. And the discussions were that if he could

12 demonstrate the fact that there was an increase, that they

13 could be classified as direct expenses, not as indirect

14 expenses.

15 Q. Even though normally speaking utilities were never allowed,

16 correct?

17 A. Correct.

18 THE COURT: He could get the increase or the entire

19 utility amount?

20 THE WITNESS: The incremental amount of additional

21 expense caused by the grant could be classified as a direct

22 expense and not an indirect expense. Direct expenses are

23 allowed regardless of what they are. Indirect expenses are not

24 allowed.

¹⁴² Sentencing Transcript Page 17

THE COURT: There was some testimony on utilities. He

18 got an approval.

19 MR. EVERDELL: Your Honor, I don't think there was

20 ever testimony that he got a prior approval for utilities. In

21 fact, he was told repeatedly that utilities were not allowed.

22 THE COURT: The difference between the utilities for

23 the apartment before and after the upgrade for air conditioning

24 and for the machinery --

25 MR. EVERDELL: I think the only testimony we had on

1 the record is that he tried to get an approval for the

2 utilities, but he never received one.

3 THE COURT: Mr. Rubinstein's quotes a utilities fi~~re

4 using Mr. Benedict's testimony at 1057 .. I can't find it. Here

5 it is, 1057.

6 MR. EVERDELL: I'm looking at the page he cited. Here

7 it just says -- his question is, this is Mr. Rubinstein's

8 question, and he is questioning --

9 THE COURT: And the discussions were that if he could

10 indicate the fact that there was an increase, that they could

11 be classified as direct expenses, not indirect expenses.

12 MR. EVERDELL: It says the discussions were, right,

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workpapers found in the 6,636 pages of unexamined criminal discovery. Despite the drumbeat of naysaying witness testimony, at the end of the day, the witnesses were wrong, or worse, lying on the witness stand under oath. Rubinstein failed to impeach their “soft” testimony with “hard” numbers from contemporaneous documentary business record forensic evidence.

(15) Brady v Maryland Violation for Bates Stamped Page 5,274 and 5,348 of 6,636

The specific document allocating power was in criminal discovery document Bates stamped page 05274 and 05348, which were never cited at trial. The Prosecution was playing “hide and seek” with this material¹⁴⁴.¹⁴⁵ This is a dual failure. It is a failure of the Defense counsel to read through and digest all 6,636 pages of discovery material. It took 5 years post indictment. This is also failure of the Prosecution because under the *Brady v Maryland* doctrine. This is because the Prosecution had a duty to bring these documents to the attention of the Defense and the Court as an exculpatory document, particularly when the discussion came up during sentencing phase of the trial by the Court. The Prosecution effectively hid the evidence in plain sight; a needle in a haystack.

(16) Telephone and Computer Costs Allowed

13 that if he could demonstrate the fact that there was an
14 increase, that they could be classified as direct expenses, not
15 indirect expenses. But there was never any approval of this.
16 So at this point none of the testimony here is talking about
17 any approval of any additional utilities, expenses, or anything
18 like that.

19 THE COURT: Sounds like approval, but not written
20 approval.

There was written approval in the audit workpapers, contrary to the Prosecutions assertions. The prosecution should have brought these audit workpapers to the Defense and Courts attention, but they did not. The schedule of allowances is in the Prosecutions' Discovery, Bates Stamped Page Prosecution Criminal Discovery Document Bates Stamped Page 5,274, and again at 5,348 never cited at trial.

¹⁴³ Sentencing Transcript Page 19

09 THE COURT: This does say the witness summarizes his
10 testimony at the end of the page. The incremental amount of
11 additional expense caused by the grant could be classified as
12 direct expense and not indirect expense. Direct expenses are
13 allowed, regardless of what they are. Indirect expenses are
14 not allowed.

¹⁴⁴ Banks v. Dretke, 540 US 668, 696 (2004)

¹⁴⁵ Id. at 695 (“Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed.”).

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Once the 6,636 pages of prosecution discovery was OCR'ed (Optical Character Recognition) and could be searched for keyboards, a number of allocations and allowances made by the OIG became findable. The auditor's workpapers showed Telephone, Cable and Computer costs allowed or allocated.¹⁴⁶

(17) Naysay Witnesses impeached by GX114 Analysis

The quality of the prosecution 'naysay' witness testimony is impeached by the hard forensic evidence revealed here. Defense Counsel only partially impeached trial inculpatory witnesses. Had Defense Counsel adequately prepared for this case the witnesses would have been completely impeached. The implicit new evidence the GX114 analysis above contradicts the prosecution various witnesses' assertions that Karron acted illegally and without authorization or justification. The existence of these documents should not have remained buried in the discovery. This information must have been known to the Prosecution.

(18) Hard exculpatory evidence trumps soft inculpatory evidence

The existence of payments for indirect costs is not evidence of a crime.

The use of federal funds in the custody of Karron for unauthorized payments is a crime under §666.

Because the nature of the ATP budgeting process, costs are shared by co-mingled government and personal funds.

The existence of payments for indirect costs is not meaning these payments were disallowed.

The payments need to be made with ATP funds.

Total costs exceeds Government funding by XXXXX; Karron funding is the only source.

This needs work; witnesses say illegal payments

Proof of allowances

Payments are not illegal/not allowed

¹⁴⁶ Bates Stamped Discovery Pages a-5347ff

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Witness impeachment, in the law of evidence, is the process of calling into question the credibility of an individual who is testifying in a trial.

(19) Conclusions

- 12. No government funds were misappropriated**
- 13. Karron Funds were used to make the Budgeted Match on Direct Costs**
- 14. Karron Funds were used to pay Indirect Costs**
- 15. Many normally Unallocable Costs were reclassified or otherwise allowed or considered allowable**
- 16. No Crime actually happened due to Karron co-funding**

(3) Ground THREE: (Brady Violation) Conviction foundation laid on erroneous, misleading, and false data causing plain error

(20) Setting the stage for Brady violations by the OIG Special Agents

The OIG special agents, after 5 years of fruitless investigation, revealing no prosecutable crime, crossed the ethics line sometime in early 2007. Prior to the expiration of the Statute of Limitations, Defendants' predecessor counsel Peeler managed to convince a succession of prosecutors that there was no case, but at extraordinary cost to the Defendant and Defendant's family. The defendant also discovered she was being blackballed and badmouthed in the Washington rumor mill. This was as the statute of limitations was about to expire.

(21) The Prosecution explicitly and implicitly suppressed exculpatory evidence and action on the part of the OIG

Possible actions on the part of the DoC OIG to induce the Department of Justice Prosecutors and Grand Jury would include the creation of inculpatory evidence, and the suppression exculpatory evidence. These actions may have rewarding the OIG auditor Riley for creating a false or copied 'joint'¹⁴⁷ audit with a Silver Medal in 2005¹⁴⁸. One can reasonably

¹⁴⁷ Joint implies Hayes, because of the copied system of errors discovered.

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consider that the OIG coerced witnesses' inducements or threats to Hayes, and Benedict. At the very least, the government compensated these witnesses to appear at trial. The record of compensation, *qui tam*¹⁴⁹ agreements, or non-prosecution agreements was never brought to the attention of the Defense. The payment of witnesses, understandings, and protection afforded or implied to witnesses must be documented. The OIG may have suggested, rehearsed, cajoled or coerced false inculpatory testimony from Lide, Benedict, Snowden, Gurfein and Spring¹⁵⁰, and suppressed exculpatory affidavits or scared off exculpatory testimony from Marc Stanley, Jayne Orthwein, Amiee and Nat Karron, Chaya Levin, Jill Feldman C.P.A., Peter Ross, Margret "Daniel" Ferrand, and Professor James Cox. Some of these potential witnesses later reported to Karron in details their interviews with OIG Special Agents. Some Defense witnesses were "spoliated" by being called to the court by the Special Agents, and not knowing any better, and sat through the trial proceedings. The field notes for these contacts must be examined to evaluate if a *Brady* violation did occur.

(22) Specific suppression of Exculpatory Actions implies suppression of Exculpatory Evidence

The OIG created the misappropriation crime when it saw ATP trying to assist Karron and CASI. ATP prided itself on helping its grant recipients, and stated so as a matter of policy at its public solicitations.¹⁵¹ Had these allowances been admitted by the ATP and a new budget been granted, there would be no crime and no case against Karron. The Jury considered these issues in its callback request for "...no[n] approved subsequent budget revisions...".¹⁵² Had the evidence and knowledge of specific documented exculpatory actions, evidence and decisions been known to the Jury there would have been no criminal foundation for the Petitioners' conviction.

¹⁴⁸ 57th Honor Awards (2005), Letter May 16, 2008 from Prosecution to Defense. "This letter provides notice, pursuant to Federal Rule of Criminal Procedure 16 (a) (1) (G) and Federal Rule of Evidence 702, that the Government may offer the expert testimony of Certified Public Accountants 1) Joan Hayes and 2) Belinda Riley. ... 2005 DOC Silver Medal Award for Meritorious Federal Service "For conducting a complex and unique joint audit investigation of costs claimed against a scientific research cooperative agreement awarded by NSIT."

¹⁴⁹ "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "[he] who sues in this matter for the king as [well as] for himself." A writ of *qui tam* is whereby a private individual who assists a prosecution can receive all or part of any penalty imposed. e.g. False Claims Act, 31 USC §3729 *et seq*

¹⁵⁰ The witness testimony vitiated or rendered false by implicit allowances in the Audit papers and GX114

¹⁵¹ See Marc Stanley Lecture and Question and Answer session of April 15, 2007 in the Declaration of Eisen.

¹⁵² Trial Transcript Page 1371 Line 3

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17. OIG Wedged Budget Negotiations

Prior to the expiration date that CASI had to respond to its adverse Draft Audit Report,¹⁵³ and after it made an initial inquiry to request an Audit Resolution Conference with ATP Grants Office, the OIG ordered all contact with CASI to go through them. E-mail traffic reveals the OIG Special Agents were behind the scenes and had wedged budget negotiations as early as Winter/Spring 2003.

18. OIG Starts formal grand jury investigation

This remarkable piece of e-mail became known during the Trial under cross-examination of Lide by Rubinstein, *viz*:

Q. ... Can you read the entirety of that e-mail?

A. Certainly. The date is **October 1, 2004**. "The Department of Justice has formally initiated a grand jury investigation regarding the NIST ATP award made to Computer Aided Surgery. In order to ensure that DOJ and the Inspector General's office are able to complete a thorough and timely investigation, we are requesting that all NIST" -- "all" is all in caps -- "NIST personnel cease contact with Computer Aided Surgery (CASI), Dr. Karron and all CASI representatives. ..

A. "Additionally please do not proceed with the audit resolution for CASI. It is extremely important that a bill not be generated for the funds that CASI misappropriated from the award. Please contact me if there are any further concerns or questions. I look forward to working with all of you over the next few months. Thank you."

Q. And who wrote that e-mail?

A. Rachel A Garrison, special agent.

THE COURT: For the Department of Commerce?¹⁵⁴ [Emphasis Added]

What this "instruction"¹⁵⁵ reveals is that the OIG was already seeking to lay a foundation for a criminal case, even when virtual all of the sought exculpatory understandings and agreements were already granted.¹⁵⁶ The OIG specifically sought to block any civil remedy, and force the criminal case. The OIG was seeking to criminalize otherwise previous allowed non-

¹⁵³ Government Exhibit GX62: Memorandum Aug 25, 2004, Final Audit Report No. ATL-16095-4-0002. "We are attaching a copy of the subject audit report for your action in accordance with DAO 213-5, "Audit Resolution and Follow-up." The original report has been sent to the auditee / recipient, who has thirty (30) days from the date of the transmittal to submit comments and supporting documentation to you." ..[comments and supporting documentation was forwarded, as well as verbal requests for Audit Resolution Conference ...and then sixty (60) days to respond... Taking this well past the October 1, 2004 e-mail above.

¹⁵⁴ Trial Transcript Page 242 Starting at Line 2

¹⁵⁵ Trial Transcript 247 Line 22, Lide .. My instructions were to cease contact. And I follow instructions

¹⁵⁶ Rent, Power, Computer Communication and Telephone, Office Clerical and some misc. Over-co-funding vitiates all other reimbursement claims against the government funds.

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criminal permissible civil behavior.¹⁵⁷ The evidence of these suppressed allowances demonstrates that the OIG expertly managed its' witnesses parade against Karron to recant exculpatory e-mail and memorandum's they produced¹⁵⁸, may have perjured themselves *en masse*, a remarkable *fete* of social engineering on the part of the OIG.

19. OIG did not suppress all clues of prior exculpatory understandings

The Defendant/Petitioner argues here that the OIG did not manage to suppress all clues of exculpatory evidence, including ATP audit allowances and preparation for a civil Audit Resolution. The **entire** foundation for the Defendant's **refusal to heed the advice from unqualified bookkeepers and uninformed project managers** would have been vitiated had evidence that Karron's negotiations on rent and utilities was actually acted upon and was part of the next proposed budget. There **must exist evidence** of that proposed budget.

20. Hayes unstable figures to OIG covered Hayes payroll misappropriation

The smoke and "Hayes" created confusion only covered her possible culpability in potential crimes on Hayes' part, namely theft of withholding taxes¹⁵⁹ and deftly setting up Karron to take the fall for the actions of Hayes as CASI/Karron accountant and 'independent' auditor.

21. Had budgets in process been approved there would be no criminal case

Had that budget with the allocation been approved, there would be no case against Karron. There was no reason they could not have been approved. There was no sound reason

¹⁵⁷ Overcriminalization" describes the trend in America ...to use the criminal law to "solve" every problem, punish every mistake (instead of making proper use of civil penalties), and coerce Americans into conforming their behavior to satisfy social engineering objectives. Criminal law is supposed to be used to redress only that conduct which society thinks deserving of the greatest punishment and moral sanction. But as a result of rampant overcriminalization, trivial conduct is now often punished as a crime. Many criminal laws make it possible for the government to convict a person even if he acted without criminal intent (i.e., *mens rea*). <http://www.overcriminalized.com/>

¹⁵⁸ In particular GX 3506-A and especially GX3506-B; following through GX3506-E

¹⁵⁹ A nagging problem is the collateral IRS investigation as to the second project year payroll taxes, which Hayes personally managed, and who blocked resolution of, that was never brought to light in this matter and which is now a quarter million dollar tax lien against Karron. <<CITATION>>

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that this case had to become the travesty of justice it now appears to be. Why did so many non-professional people turned on Karron? Does **discrimination** play when they discovered that the male Dr. Karron was a female to male transsexual? Did they feel Karron lied to them? Was there an element of moral outrage in the success of the prosecution social engineering? No professional colleagues turned on Karron. Prof. Cox reported the OIG attempted to coerce him to say things he refused to say. They spoliated his potential testimony to the Defense by telling him to report to court, where he sat in the audience for the trial proceedings. Had the hard evidence of these allowances been brought to the attention Jury, they could not have found the Petitioner guilty. The OIG created an injustice by gaming the system to the detriment of the Defendant.

(23) Adversarial Pressures discourage Brady Compliance

Adversarial pressures on prosecutors discourage *Brady*-compliance,. Further *Brady* compliance is discouraged by the judiciary's permissive interpretation of the prosecutor's duty under *Brady*, which required a prosecutor to make a prospective, pretrial determination as to the probative value of certain evidence in his possession that might be materially favorable to the accused and to immediately disclose that evidence.¹⁶⁰ However, this prospective duty of the prosecutor mutated into a retrospective, post-conviction determination by an appellate court as to whether the prosecutor's nondisclosure, in the context of the entire record at trial, makes it reasonably probable that, had the evidence been disclosed, the defendant would have been found not guilty.¹⁶¹ By adopting this retrospective, post-trial standard to define the scope of the defendant's constitutional right to certain evidence prior to trial, the Court made it increasingly easy for prosecutors to evade their *Brady* duty. This can be done by simply by claiming that given the strength of their case, and the confidence they had in the quality of their evidence, they believed that it would be inconceivable that any evidence they possessed might 'reasonably' be viewed as so favorable to the accused that this evidence could cause a not guilty verdict.¹⁶²

¹⁶⁰ US v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001)(suggesting that Court in *Brady* "appears to be using the word 'material' in its evidentiary sense, i.e., evidence that has some probative tendency to preclude a finding of guilt or lessen punishment").

¹⁶¹ Bagley, 473 US 699-700 (Marshall, J., dissenting)(*Brady* duty defined "not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively by reference to likely effect the evidence will have on the outcome of the trial").

¹⁶² Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 653 (2002).

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(24) Prosecutors encouraged to game the system

Under this perverse standard of constitutional due process, a prosecutor is encouraged to play games,¹⁶³ i.e., to

- “gamble” and
- “play the odds,”¹⁶⁴ to
- “bury his head in the sand,”¹⁶⁵ play
- “hide and seek” with the accused,¹⁶⁶ and require the accused to undertake a
- “scavenger hunt” for hidden Brady clues.¹⁶⁷

And further emboldening a prosecutor to evade Brady with impunity is the knowledge that the undisclosed evidence probably will remain hidden forever,¹⁶⁸ and that even if the evidence ever does surface, the obstacles to a defendant successfully using it are daunting.¹⁶⁹ Brady violations are the a principal cause of convictions of innocent persons.¹⁷⁰ the widespread incidence of Brady violations is also a matter of increasing concern to the courts. Dozens of

¹⁶³ Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

¹⁶⁴ Bagley, 473 US at 701

¹⁶⁵ US v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990). See Gershman, *supra* note 125, at 551 (“The prosecutor’s claim of ignorance as an excuse for compliance with Brady resembles a defendant’s claim of ignorance as an excuse to avoid criminal liability.”).

¹⁶⁶ Banks v. Dretke, 540 US 668, 696 (2004) (“A rule thus declaring ‘prosecution may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendant due process.”).

¹⁶⁷ Id. at 695 (“Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed.”).

¹⁶⁸ Imbler, 424 US at 443-444 (White, J., concurring) (“The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface.”); US v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) (“the government’s failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable”);

US v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) (“[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files.”), vacated sub nom. US v. Pfaumer, 473 US 922 (1985)(mem.). See also Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L. J. 1450, 1455 (2006) (“Defendants only rarely unearth suppressions”); Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1579 (2000)(arguing that in most cases “withheld evidence will never see the light of day”); Bibas, *supra* note 106, at 142 (“Because Brady material is hidden in prosecutors’ and police files, defense lawyers probably will never learn of its existence. Most defendants lack the investigative resources to dig up Brady material.”).

¹⁶⁹ Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)(imposing stringent pleading requirements imposing on plaintiff need to show that claim is facially plausible and contains sufficient factual content that allows court to draw reasonable inference that defendant is liable for misconduct).

¹⁷⁰ Weinberg, *supra* note 134 at 2 (noting that in 28 cases involving 32 defendants, misconduct by prosecutors, including suppression of exculpatory evidence, led to the conviction of innocent persons); US v. Jones, 620 F. Supp.2d 163, 170 (D. Mass. 2009)(noting that ‘in response to a disturbing number of wrongful convictions resulting in death sentences, in 2002 the Illinois Commission on Capital Punishment recommended that the Illinois Supreme Court ‘adopt a rule defining ‘exculpatory evidence’ in order to provide guidance to counsel in making appropriate disclosures.”); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 688 n. 18 (2006)(listing several cases in which a prosecutor’s suppression of exculpatory evidence led to the conviction of innocent persons).

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cases in the federal courts since 2007 have found serious Brady violations.¹⁷¹ *Brady Cases and treatises, below*

In *US v. Jones*,¹⁷² US District Judge Mark L. Wolf castigated the federal prosecutor for her “egregious” Brady violation, stating that “this case extends a dismal history of intentional and inadvertent violations of the government’s duties to disclose in cases assigned to this court.”¹⁷³ Judge Wolf appended Appeals and Federal District Courts in which the courts vacated convictions for serious *Brady* violations.¹⁷⁴ And in two recent highly-publicized prosecutions – the Duke Lacrosse case and the federal trial of then-Senator Ted Stevens – Brady violations were discovered that were so serious as to result in the conviction of criminal contempt and disbarment of the Duke prosecutor, Michael Nifong,¹⁷⁵. A most egregious further example is the federal district court’s vacating of Senator Stevens’ conviction, dismissing the charges, the commencing criminal contempt proceedings against six prosecutors for obstruction of justice.¹⁷⁶

(25) Setting the stage for Brady Violation: Politics and the ATP program under attack, and ultimately terminated.

The NIST ATP program, a child of the Clinton Administration, came under attack of the first Bush White House¹⁷⁷. The administration’s goal is to improve the program out of existence. Program staff was afraid for their jobs. A number of other grant recipients were similarly attacked in audit findings. Prior to Karron’s conviction, no grant recipients were ever convicted.

¹⁷¹ For recent cases in the US Supreme Court involving Brady violations, see *Cone v. Bell*, 129 S. Ct. 1769 (2009)(remanded for hearing into prosecutor’s suppression of evidence regarding seriousness of defendant’s drug problem); *Youngblood v. West Virginia*, 547 US 867 (2006)(suppression of evidence indicating that testimony of key witness was false).

¹⁷² 620 F. Supp.2d 163 (D. Mass. 2009).

¹⁷³ *Id.* at 165

¹⁷⁴ *Id.* at 185-193

¹⁷⁵ Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at 21; Shaila Dewan, *Duke Prosecutor Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007. See *North Carolina State Bar v. Michael B. Nifong*, No. 06 DHC 35 (June 16, 2007).

¹⁷⁶ *US v. Stevens*, Cr. No. 08-231 (D.D.C. April 7, 2009)(Motion Hearing)(Docket No. 372). (district court appoints special prosecutor to investigate and prosecute the matter). *Id.* at p. 46-47.

¹⁷⁷ WWW.expectmore.gov : The purpose of the Advanced Technology Program is to fund the development and commercialization of high-risk technologies through co-funding R&D partnerships with the private sector. **RATING:** There is little need for the program. There are other available funding sources for the development of high-risk technologies, including venture capital and other private-sector sources. It is not evident that the program has a unique or significant impact on its intended purpose. **IMPROVEMENT PLAN** We are taking the following actions to improve the performance of the program: Working with the Administration and Congress to terminate this program.

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Following Karron's conviction, and without the protection of the defunct ATP program other grant recipients have since pled guilty to felony misappropriation. As OIG Auditor Riley mentioned at her site visit "We get most of our business from ATP". Only Auditor Riley, despite two field audits, never did an audit in this case. Is this politics?

(26) Undue influence of Hayes on Budget and Audit Negotiations

Hayes, seeking to protect herself from Karron for bad accounting, may have attempted to turn on Karron and become a whistleblower. She apparently contacted the OIG sometime in the early winter or spring of 2003, while simultaneously endlessly extending and promising completion of the ATP audit. Prior to this time, negotiations were progressing well, with most issues being resolved during negotiations. Power, utilities, and rent were reclassified. A new budget was about to be ratified.

However, Hayes was not happy. She wanted excessive control over Karron and CASI. During this period, Hayes was gossiping with ATP's Snowden and OIG's Garrison-Ondrik, and keeping this secret from her client, CASI and Karron. Hayes continuing to meddle with CASI affairs well after the project suspension through the winter of 2003¹⁷⁸. She had given a copy of the hostile audit report to the OIG auditor Riley at her first site visit in June 2003<<CITATION INTO TRANSCRIPT>>, while continuing to claim to Karron that the report was not done until the last day it could be submitted under AICPA rules, Sept 29, 2003<<CITATION>>.

(27) Authority for Allocations negotiated

The authority for these early ATP allocations comes from the White House office of Management and Budget rules for Allocability. For example, under OMB A-21, Cost Principles, costs charged to a project must meet the following criteria:

1. Allowable under the cost principles of A-21 and under the terms of the specific award;
2. Allocable in that the cost can be associated with a high degree of accuracy to the sponsored project; and
3. Reasonable in what a prudent person would pay for the item in a like circumstance

¹⁷⁸ CASI Payroll Checks, funded by Karron, started appearing with Hayes name on the masthead.<<CITATION>>

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All of the Allocations and Allowances NIST ATP granted CASI meet these requirements. As a small single project entity, with complete primary records, NIST ATP had no reason not to do so.

(28) The OIG did NOT do an audit.

Did Hayes do an audit of CASI? She plainly wore too many hats to be independent, and she was downright hostile. Did Riley copy the Hayes Audit? Curiously, Riley volunteers this affirmation despite it not being asked by Rubinstein.

"I did not take Joan Hayes' report and copy the numbers to come up with this."¹⁷⁹

Riley admits she did not even to the most basic step of an audit, reconciliation of bank statements.

24 Q. Did you do a bank reconciliation of the various bank accounts of CASI?

1 A. For this, for this audit?

2 Q. Right.

3 A. No.

1 (At the sidebar)

2 MR. KWOK: Grounds?

3 MR. RUBINSTEIN: The grounds -- these are some summary, some documents that she [RILEY] doesn't have, that she's unaware of, and she came up with these numbers from where we will never know because we don't have original source documents to look at, judge. She clearly relied upon other people's work to determine the cost. It's hard to believe that someone could be an auditor and not reconcile bank accounts that probably had less than 500 checks in total, for the period that we're talking about.¹⁸⁰

Rubinstein was wrong. We can now know the source of Riley's numbers because she copied Hayes numbers with their tell tail errors into her report without verification. The unique system of errors in Hayes' number 'fingerprint', like DNA analysis, the source of Riley's numbers. Dunlevy, Defense forensic bookkeeper noted in her forensic analysis, the first thing an

¹⁷⁹ Trial Transcript Page 473 Riley - direct

6 The -- I used the records that they provided and,
7 including Joan Hayes, what Joan Hayes had provided to come up
8 with the numbers for this. **I did not take Joan Hayes' report
9 and copy the numbers to come up with this.**

¹⁸⁰ Trial Transcript Page 473ff: Riley - direct

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auditor would do is verify the Payroll expenses, the largest expense of a project. Clearly, Riley copied previous results, or someone else did for her. Her annotated trial testimony transcript is in the appendix below.<<CITATION>>

We can conclude that Riley, as the OIG designated field auditor did not actually do an audit of CASI, she copied large sections, if not the entirety of it. Was Riley's conscience bothering her? Hard numbers from Dunlevy's forensic reconstruction and analysis say she copied. The patterns of Riley OIG errors match the pattern of Hayes errors, much as hard forensic fingerprints or DNA evidence can overcome soft witness testimony and result in the overturning of convictions. The OIG did not do an Audit. It was a lynching.

(29) Daubert Standard Violated by Riley not raised by Rubinstein

The Daubert standard¹⁸¹ is a rule of evidence regarding the admissibility of expert witnesses' testimony during trial. Pursuant to this standard, a The Defense should have raised a Daubert motion when Riley revealed she had not done an audit¹⁸². A Daubert motion is a special case of motion *in limine* raised the presentation of unqualified evidence to the jury by expert witnesses. Expert testimony with Daubert/Federal Rule of Evidence 702's requires that all expert testimony be subject to a stringent reliability test. Rubinstein clearly failed to inhibit Riley's testimony in the face of her stunning admission.¹⁸³

22. Daubert Gaps in experts chain of inference

As Daubert jurisprudence evolves, it becomes clearer and clearer that the debate is frequently about "gaps" in the expert's chain of inference. Failure of the government auditor to reconcile accounts is such a gap. Trial courts have little or no discretion in determining whether a jury could legitimately bridge them. Riley's testimony should have been stricken from the record. Rubinstein let it stand and retired in disgust<<CITATION>>. For multiple reasons, Riley had no basis in a forensic audit for her assertions without having reconciled accounts for

¹⁸¹ Bernstein, David Eliot, Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution (February 2007). Iowa Law Review, Forthcoming; George Mason Law & Economics Research Paper No. 07-11. Available at SSRN: <http://ssrn.com/abstract=963461>

¹⁸² Trial Transcript Page 473 Line 24 Q. Did you do a bank reconciliation of the various bank accounts of CASI? A "For this audit?" Q: Right A: No

¹⁸³ Peter J. Neufeld, JD. (July 2005) The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform, Vol 95, No. S1 | American Journal of Public Health S107-S113 DOI: 10.2105/AJPH.2004.056333

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which she based her assertions. Reconciliation of bank and credit card accounts as the very first step in any audit. After an audit is made then an auditor can conclusory statements from her audit findings. The problem is Riley made conclusions without reconciliation, and by copying statements from Hayes (including errors).

(30) OIG Auditor False Sworn Affidavits, secret joint award

OIG Auditor Riley won a secret silver Department of Commerce Medal award in 2005. This was not listed on the award publicity brochure. It was listed on the expert witnesses' resumes.¹⁸⁴

(31) Other Evidence of Brady Violations

The OIG interviewed everyone in Karron's life during and prior to this period. Some of these people reported their contact with the OIG to Karron. Many of these interviewees reported signing affidavits. Some of these affidavits were exculpatory in nature and never brought to the attention of the Defense. Witness Lee Goldberg memorialized his coercive interview in a memorandum to Karron, in which he said the OIG asked leading questions about his investment in CASI and Karron. Further he reported being questioned about sex with Karron and if there was a *quid pro quo* for sex with Karron. Other interviewees' reported that they were made fearful that they would get in some kind of "trouble" if they did testify in court. The OIG coerced witnesses to 'get on board' against Karron or succeeded scared them off and denying their exculpatory evidence at the trial. The following potential witnesses reported OIG interviews and may have provided exculpatory evidence not provided to the Defense at trial.

- James Cox, Ph.D. (CASI colleague and Brooklyn College CUNY Professor extensively and coercively interviewed by OIG)
- "Caren" Chaya Levin (Former CASI Bookkeeper who contacted Karron after being Interviewed by OIG)
- Peter Ross, PhD (Described OIG interviewing)
- Margret Ferrand (CASI Cleaning and Clerical Contractor)
- Jill C. Feldman (CASI Accountant)
- Amiee Karron-Idan (Family)
- Nathaniel Karron (Family, deceased)

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The OIG should have revealed the existence of other affidavits and witnesses to the Defense, even if they felt that the testimony was immaterial or false¹⁸⁵

(32) Nondisclosure was serious enough that there is a reasonable probability that suppressed evidence would have produced a different verdict

The Prosecution failed to disclose the ATP reclassification of the Rent checks and the allocation of the power invoices. These two issues are among the most the two most serious of the that convicted Karron, creates the very real probability, if not possibility, that Karron was convicted of 'stealing' her own funds out of the Personnel Budget Line A.

(33) Verdict worthy of confidence

The post-conviction revelation of clues that point to suppressed exculpatory evidence casts the jury's guilty verdict into question. Had the Jury known that the NIST ATP had in fact acceded to Karron's requests they would not have rendered the same verdict.

(34) Conclusions

A materially erroneous audit admitted at trial as expert testimony¹⁸⁶. A final audit report OIG, which is festooned with math errors small and large. The audit expert wins a silver medal for doing this faulty joint audit copied from a hostile audit. What kind of accounting organization does this? Was this political or discriminatory?

There was never an independent done audit by anyone in this case: until now. The audit was a lynching. The few foundational numbers presented by the Prosecution at trial are now suspect. The evidence of previously agreed to allocations and reclassifications was suppressed by the OIG, and by the Prosecution. The Defense counsel never attacked these material errors to his clients' detriment. Nevertheless, The OIG and the Prosecution must have suppressed a lot of

¹⁸⁵ Disimone v. Phillips, 461 F.3d 181, Docket No. 05-6893-pr (2d Cir. Aug. 22, 2006). Prosecutor cannot avoid Brady obligation by claiming that he did not believe witness's exculpatory statement. Op. 23 "If the evidence is favorable to the accused, then it must be disclosed, even if the prosecution believes the evidence is not thoroughly reliable." Id. "To allow otherwise," the Circuit concludes, "would be to appoint the fox as henhouse guard." Id.

¹⁸⁶ Trial Transcript Page 475: Riley – direct: at sidebar conference with COURT

12 MR. KWOK: Your Honor, we offer her as an expert

13 witness under Federal Rules of Evidence 703. Underlying

14 documents that an expert rely upon does not have to be

15 admissible.

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evidence, but not so thoroughly enough that some prior truth is still visible in the crudely hacked numbers in GX114 with only a little bit of thinking and arithmetic. Now is the time to review this missing suppressed material.

Had the Jury know about all of this goings on behind the scenes would they have had the same confidence beyond a reasonable doubt in the government numbers as to indict the Defendant?

(4) Ground FOUR: Ineffective Assistance of Counsel

In all criminal prosecutions, the accused shall ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VI of the Bill of Rights

The Constitution guarantee of Assistance of Counsel was denied the Defendant trial defense. The Defendants' Sixth Amendment right to effective assistance of counsel fails under the two-pronged test set forth in Strickland v. Washington, 466 US 668 (1984), which requires a convicted defendant to show that

- (1) "that counsel's representation fell below an objective standard of reasonableness...under prevailing professional norms," and
- (2) "that the deficient performance prejudiced the defense," *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

By each and every of the applicable ABA models rules of professional conduct¹⁸⁷, at pivotal trial events, Rubinstein fails. By Because of these failures, he directly caused a miscarriage of justice.

(35) Background to IAC Argument

Early in the case the Court and Karron had no sense of what direction Rubinstein was going to pursue in his Defense. He missed key pre-trial opportunities to conduct Discovery, and to prepare a comprehensive forensic accounting defense. He kept assuring the Defendant that her innocence was apparent, and the government had no real case. That is because, as it would

¹⁸⁷ Model rules of professional conduct By ABA Center for Professional Conduct, Center for Professional Responsibility (American Bar Association) 2009 Edition

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later become clear, Rubinstein had no idea himself. Rubenstein thought he could “fly by the seat of his pant”, or “wing it” in the face of the Prosecution. Because of this, he missed the many holes and contradictions in the OIG accounting, or where he did notice it, he did not make advantage of the many flaws in the Government’s case. Absolute worse, he rested at the fateful sidebar on Tracing of Funds and the OIG Auditor revealed she, essentially, did not do an audit.¹⁸⁸ He rested when he surrendered at the key juncture that should have fought.¹⁸⁹

(36) Background to Rubinsteins taking the Karron case

Rubinstein was retained by Karron on May 8, 2008¹⁹⁰. In retrospect, Rubinstein underbid the case to Karron, to win Karron as a client, or out of a quixotic sense of Justice. Karron never considered the possibility of a criminal conviction because of the assurances Spitz¹⁹¹ and Dunlevy¹⁹² who had worked on the case for years. They assured Rubinstein that there was no basis for misappropriation based on their analysis of Karron’s spending and funding. They were approved by the court as experts¹⁹³, but Rubinstein failure to engage these experts.

Mel Spitz is a C.P.A., Certified Public Accountant. The government has notified defense counsel of its intention to offer the testimony of both Joan Hayes and Belinda Riley, who will be testifying about "generally accepted accounting principles and auditing procedures that they followed and applied in the course of their work relating to Computer Aided Surgery Inc. ("CASI"). See Exhibit A "Letter dated May 16, 2008, attached hereto."

In 2003, CASI hired Mel Spitz as an accountant. At one time, Mel Spitz, on behalf of CASI, met with Belinda Riley, the government's expert witness, to compare and try to reconcile his accounting results performed for CASI with the accounting results achieved by Belinda Riley. It is anticipated he will testify to the discrepancies between his work and the government's expert witness. The government and Belinda Riley have in their possession and are familiar with the work product that Mel Spitz achieved as it was attached as Appendix III to the Final Audit Report prepared by Belinda Riley and the OIG.¹⁹⁴

(37) OIG seizes All CASI / KARRON computers, and ALL Defense Evidence

¹⁸⁸ Trial Transcript Page 473ff Line 24 *et seq*

¹⁸⁹ Trial Transcript Page 811 Line 18

¹⁹⁰ , with personal check 5241 for 5,000.00, Karron Exhibit <<CITATION>>

¹⁹¹ GX62, CASI Response to OIG Draft Audit Report, Prepared by Spitz, Appendix III, Page 26ff of 68

¹⁹² DX XXX, DX-XXX-1, DX Z, DX ZZZ, DX ZZZ-1, Trial Transcript Page 24 Line 10, Page 1164ff Line 19 on, Page 1172 Line 18, Dunlevy Declaration

¹⁹³ US v. Daniel Karron, 07-cr-00541 Docket Item 46

¹⁹⁴ *Ibid* Page 2, Paragraphs 6 and 7

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Karron had 16 terabytes of contemporaneous business and personal records in her Defense. Then the Government seized all of the Defendant's records in the guise of recovering program computers and civil forfeiture. They took every computer in the Defendant's apartment, along with the Backup tapes, without regard to the source of funds that paid for it¹⁹⁵. The cost of defense started to explode.

(38) Rubinstein's Response to initial Discovery Material and Defendant efforts to help prep

Rubinstein's reaction to the initial discovery disclosure of some 6,636 pages, declared he would not spend out of pocket. The Defendant sought to assist Rubinstein in all ways possible. The Defendant is highly skilled in computer science. The Defendant endeavored to prepare Rubinstein for the trial. The Defendant scanned and OCR'ed¹⁹⁶ the entire submission. The Defendant was able to navigate the discovery and made important findings. Rubinstein did not or would not pay attention until it was too late.. Rubenstein ignored the Defendant's computer forensic help as well as the Defendant's recovered data from the OIG Disk images, Completed in March 2007. Rubinstein instead chose a cheap intent based defense, instead of a more expensive forensic accounting based defense strategy.

(39) Rubinstein Plays "Chicken" with Defendant and Court

Rubinstein blundered into this case unprepared. He was unprepared on purpose. He was playing a dangerous 'game of chicken'¹⁹⁷ with his client and clients family. He repeatedly stated would not do any preparation on this case until he was paid.¹⁹⁸ He was betting his professional reputation and standing in the court to pressure the Karron family for more money. The Defendant was furiously sending him e-mail containing key documents, statutes, material to put into evidence. He made a show of not doing his pre-trial homework to pressure the defendant until he was paid. He further upped the stakes by applying to the court to be relieved of the case unless he was paid¹⁹⁹. He was apparently conflicted by his desire to defend and greed that

¹⁹⁵ GX 120

¹⁹⁶ Optical Character Recognition, or Rendered the page images into searchable text.

¹⁹⁷ The game of chicken is a model of conflict between two players in game theory. The principle of the game is that while each player prefers not to yield to the other, the worst possible outcome occurs when both players do not yield.

¹⁹⁸ Affidavit of Abe Karron<<CITATION>>

¹⁹⁹ See Below

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crippled his defense by lack of preparation. He then made an unprofessional public showing of refusing to prepare for trial until he got an additional retainer via the court through the sale of the Defendant's apartment. On March 17, 2008 asked the court to be relieved as Defense counsel, viz:

...Trial is presently scheduled for June 2, 2008, and substantial time must be spent on preparation. I am not confident the sale will take place before the start of trial and I find it unconscionable to prepare and try this case without prior compensation.

Thus, [i]n light of the foregoing facts, I respectfully request to be relieved from defending this case because of the heavy financial burden and time it will take away from my other clients'²⁰⁰

The apartment was contracted for sale as of April 2, 2008²⁰¹ On May 21, Rubinstein wrote the Court, viz

Dr. Karron's contract to sell was executed and the closing date is May 28, 2008. At the May 19, 2008, status conference, counsel requested the Court modify its prior order to permit the firm of Rubinstein & Corozzo, LLP, to receive at the closing a check in the amount of \$1 00,000 out of the proceeds of the sale with the balance, after closing costs, to be paid to the US Marshal's service subject to further order of this court.

Counsel agreed to accept this amount for the pre-trial work already performed and all work up to trial on June 2, 2008. The defendant in open court consented to the Court granting this order. The government has no objection.

Please accept this letter as a request for an order granting the direct payment of \$100,000 to Rubinstein & Corozzo, LLP, for the firm's pre-trial services, from the proceeds of the sale of Dr. Karron's apartment, 4 N, 300 East 33'd Street, New York, New York, 10016.

This closing was May 28. The trial commenced June 2, 2007. This left only **Four** days for Rubinstein to become prepared. This created an irreconcilable conflict between Counsel and Client. Rubinstein went into the trial with only four days preparation. The pre-trial preparation was paid for per above. Rubinstein resented running up a bill for the trial days. Rubinstein did not keep any timesheets or time records prior or since. Rubinstein was under his own gun to conclude the trial early, cheaply and quickly. This led to a succession of completely unreasonable weak and poor defense strategies and decisions to the detriment of the Defendant. Rubinstein grossly underestimated the cost of defending his client, and made poor decisions about how to defend Karron based solely on preserving his own portion fee at the expense of his clients. Rubinstein bet that he could get more money from the Karron family. Rubinstein bet the court to get his the proceeds from Court ordered sale of Karron's apartment, and got the funds

²⁰⁰ *US v. Daniel Karron, 07-cr-00541 Docket Item 34*

²⁰¹ *US v. Daniel Karron, 07-cr-00541 Docket Item 36*

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too late. Rubinstein lost because he sacrificed his client, and ultimately his professional reputation. Counsel was conflicted, and would not focus even during the trial. Because of this Karron was denied her constitutional right to Counsel.

(40) Rubinstein pursued an unreasonably wrong defense strategy

The overarching theme of Defense Counsel's strategy was to prove that the Defendant had no criminal intent²⁰². This was a fatal strategic flaw in this case. It is an unreasonably wrong strategy under the *Strickland* criteria²⁰³ in light of *Urlacher*. Rubinstein made a unreasonably wrong and unprofessional decision not to prepare for the case. He rejected help from the Defendant and from the Defendant's forensic team. Further, he did not do any legal research. Had he done so, he would have been prepared to deal with the *Urlacher*'s precedential standard and not blundered into it and whine about how unjust it is.

(41) Rubinstein was dangerously computer illiterate and tried to hide this until it was too late.

Rubinstein's desperate computer illiteracy, which he tried to conceal, also caused him to make unreasonable decisions.²⁰⁴ Rubinstein, in retrospect, should have pursued a forensic based defense to show that there unaccounted costs or misappropriations. But it is now apparent that Rubinstein was incapable of managing the amount of paper common in evidence intensive modern white collar defense. Rubinstein did not study or understand the forensic defense. He had no clue about how to use the data on the Defendant's computer. His reputation as a blue-collar criminal lawyer was legendary within the family. However, the defendant has come to learn his deserved reputation for white-collar defense is bad.

(42) Rubinstein failed to engage forensic expert witnesses standing by.

²⁰² Trial Transcript Page 5

10 MR. RUBINSTEIN: Yes, your Honor. The defense is very
11 simply that Dr. Karron had no intent to do anything -- to do
12 anything that rises to the level of criminal responsibility.

²⁰³ To establish deficient performance, it is not enough for a Petitioner to show that his attorney's strategy was merely wrong, or his actions unsuccessful; he must demonstrate that the actions his attorney took were "completely unreasonable." *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997) [quotation omitted]

²⁰⁴ Rubinstein never had his own e-mail address; he uses his wife's e-mail. She prints out messages for him to read before he goes to work. This was not revealed to the Client/Petitioner until after the trial, when it became clear Rubinstein did not read, even get any of the hundreds exculpatory items Karron was attempting to e-mailing him. After Rubinstein was engaged, Goldberg coined the term 'e-mail refractory' because sending Rubinstein e-mail was like trying to burn asbestos with an alcohol torch.

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The defendant's co-funding vitiated the central prosecution assumption of no-co-funding. Rubinstein raised the issue of in-kind co-funding²⁰⁵ and cash contributions at did not pursue it. Because of the conflict caused by underfunding, Rubinstein decided not to pursue the more expensive CPA driven forensic based defense. Rubinstein would have had to share his fee with Melvin Spitz, CPA. Spitz, as the forensic accountant who had (at the time) successfully convinced the OIG Auditor, on her re-audit visit in December 2003, that the project was not the train wreck Hayes was trying to make it into. OIG Auditor Riley, on her exit interview told Spitz she felt the project would resume. Because Spitz was not called to the witness stand, this important exculpatory evidence never made it to the Jury consideration.

²⁰⁵ Trial Transcript Page 209 : Lide - cross

25 Q. Now, CASI had equipment when they received the grants that

Trial Transcript Page 210

1 they owned prior to receiving the grants, did they not?

2 A. Yes.

3 Q. And there is a concept in co-funding that you could use

4 equipment or in kind, other than cash, as your contribution for

5 co-funding, correct?

6 A. Only to a certain level.

7 Q. But you can use it. In other words, if someone has

8 \$100,000 worth of equipment when the grant starts, they could

9 utilize that hundred thousand dollars to a percentage of the

10 hundred thousand as their contribution to the grants in lieu of
11 money?

12 A. No. It would not be a percentage of the hundred thousand.

Trial Transcript Page 240 : Lide - recross

24 THE WITNESS: I should have confidence in myself. The

25 total value of any "in kind" contributions used to satisfy the

1 cautionary requirement may not exceed 30 percent of the

2 nonfederal share of the total project costs. And I had said a

3 third.

Trial Transcript Page 246ff Lide - recross

21 The budget slide, of course equipment plays a big role

22 in the budget, especially in a project such as this.

23 The audit would have to audit the equipment.

24 An audit problem is estimated versus actual costs

25 requested or failure to document cost share. Both of those

1 could -- a price-based value of contribution, all of those

2 could relate to equipment, if that's what's in question.

3 And I suspect it won't be under the technical and

4 business project management, so --

5 Q. So, it's fair to say there is no place in your slide

6 presentation that says you can only use equipment up to 30

7 percent as to nonfederal expenses, right? There is nothing

8 that says that.

9 A. Not in that document, but it occurs in many other

10 documents.

[Rubinstein never got an estimate of the allowable co-funding and Lides Testimony on this point was never followed up]

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(43) Rubinstein fails to notice *Brady* Violations in Riley's field note missing.

The prosecution never offered, never made the defense aware of and therefore suppressed Riley's exculpatory field notes and e-mail from her re-audit visit. Spitz related this positive exit interview to Karron, who then continued the project with borrowed funds despite continued meddling from Hayes during this period with the full expectation in 2004 that the project would be resumed. The existence of 'new' hard clues in the *GX114* numbers means more supporting evidence must exist.

(44) Rubinstein did not know about *US v Urlacher*

Rubinstein's lack of preparation became clear during the trial when the prosecution surprised Rubinstein with their interpretation of the foundational precedential case, *US v. Urlacher*, 979 F.2d 935. ABA Model Rule 1.1²⁰⁶ calls out for competent representation of a client. The rule also calls for reasonable diligence and promptness in client matters. Finally, *Rule 1.1* requires an adequate level of preparation and investigation. Passing familiarity the presidential case law is clearly part of adequate preparation. Rubinstein was blindsided by *Urlacher* when cursory research would have revealed its existence. To become cognizant of *Urlacher* so late in a criminal trial pulled the foundation out of the Defense case-in-chief²⁰⁷. Rubinstein flew by the seat of his pants and did not have a safety net; a forensic schedule as proof of co-funding and counter forensic exhibits. This is clearly a glaring exhibition of ineffective preparation by counselor Rubinstein. The Rule 33 Motions and the Circuit Court Appeal both failed because of *Urlacher* standard.

(45) The "Knowing" *mens rea* standard

As the changing tide in white collar criminal prosecutions makes abundantly clear, classical *mens rea*, or criminal intent is no longer required for a criminal conviction.²⁰⁸ Entire advocacy organizations are strenuously attacking the overcriminalization of federal statutes,

²⁰⁶ Model rules of professional conduct By ABA Center for Professional Conduct, Center for Professional Responsibility (American Bar Association) 2009 Edition

²⁰⁷ Trial Transcript Page 5

10 MR. RUBINSTEIN: Yes, your Honor. The defense is very

11 simply that Dr. Karron had no intent to do anything -- to do

12 anything that rises to the level of criminal responsibility.

²⁰⁸ Harvey A. Silverglate(2009): Three Felonies a Day: How the Feds Target the Innocent. Amazon.com

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books are written, and congress is writing and rewriting laws to the 'Knowing' standard without regard to the criminal mental state of the Defendants. In addition, as the Defendant discovered, the prison where she was 'visiting' was filled with people convicted without any traditional criminality; Convictions are won on strict liability standards of knowing without criminal intent.

Karron was astounded to find the Federal Prison Camp populated with physicians, physician scientists, CPA accountants, surgeons, entrepreneurs, dentists, lawyers, criminal lawyers, government contractors and government contract specialists, legal secretaries, paralegals, civil servants, politicians: all sorts of professionals. Rubinstein had not done his homework and prepared the wrong defense strategy.

(46) Results of Prior Counsel arguments on Intent

Previous Counsel Peeler had convinced a succession of Assistant US Attorneys on the basis that Karron did not have provable criminal intent for 4 years. During the past 4 years the role of criminal intent had almost disappeared in white collar crime convictions²⁰⁹²¹⁰²¹¹. Rubinstein, had he done his homework would have realized that this defense strategy would not work anymore.

23. Deficient Numerical Analysis by Prosecution

23)Move to grounded argument

House v Bell forensic evidence meet the *Schlup* standard. New forensic re-analysis and evidence meet the standard to re-open the case similar to forensic DNA evidence. However this 'new' evidence is not DNA evidence, it is evidence that the OIG's Deficient Numerical Analysis²¹² covered up or framed the Defendant.²¹³

²⁰⁹ <http://www.overcriminalized.com/default.aspx> or

²¹⁰, 'Overcriminalization', Erik Luna, THE OVERCRIMINALIZATION PHENOMENON, AMERICAN UNIVERSITY LAW REVIEW Vol. 54:703. Or

²¹¹ Without Intent How Congress Is Eroding the Criminal Intent Requirement in Federal Law, by Brian W. Waslh and Tiffany M. Joslyn, published by the Heritage Foundation SPECIAL REPORT #77 2010.

<http://www.heritage.org/Research/Reports/2010/05/Without-Intent>

²¹² D. N. A.

²¹³ Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655,659 (2005). See generally 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1:1-1:9 (2007)

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24) Failure to engage

Because Rubinstein failed to engage forensic experts, this evidence was not available during trial. This new evidence required intensive analysis post-conviction, and could not be determined before trial by due diligence because Rubinstein's Ineffective Assistance of Counsel. Prior Forensic Analysis was focused on primary documentation, not on secondary analysis of the government exhibits. The Government Exhibits, as such was not subject to forensic scrutiny, even if it forensic experts had been retained in a timely fashion. The focus was on the primary defense exhibits.

25) Failure to mount Forensic Accounting based defense.

Counsel's failure to mount a forensic accounting defense directly led to the jury's being unable to find the Defendant innocent because no alternate theory of Karron's spending was presented to the Court or Jury. Rubinstein only managed to show that the initial Salary advance was paid back, but neglected to show that about of the cash proceeds were spent on program costs. Rubinstein noticed that GX114 did not add up

Even the court noticed problems with this, but despite this Rubinstein did not bring up these issues to the Court and have the Exhibit stricken from the Record and offering a correct spending schedule. As this Exhibit was pivotal in the jury's decisions, as evidenced by the jury read back/callback of this exhibit during its brief deliberations, had the jury had been given a basis to find Karron innocent on a correct schedule, instead of guilty on a plainly erroneous schedule, the outcome of Karron's trial would have been innocent instead of guilty.

Failed to realize that ATP acceded to all of Karron's requests to reclassify and allocate normally indirect costs as direct.

- Rent
- Power
- Telephone
- Computer Communication
- Failed to realize that the cleaning contractor Ferrand was allocated by Karron.
- Failed to realize that the project was beyond sufficiently co-funded (Over Co-Funded).
- Failed to realize that the audit was fraudulent and pursue the issue.
- Failed to conduct discovery to further support the forensic evidence of allowances and reclassification.

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26) Defense counsel tried to reduce costs and maximize his fee lost

One can only assume that defense counsel failure to engage a forensic defense was require paying significant proportion of defense counsel fee to the forensic accounting subcontractors Spitz and Dunlevy. Spitz was the original successor forensic accountant Karron had brought in in 2003 to rebut the faulty OIG audit. Had Rubinstein brought key forensic points to the attention of the Court and Jury that would have resulted in an innocent verdict.

27) Rubinstein insults forensic accountant and bookkeeper

Spitz, an orthodox Jew, would not testify during the upcoming Jewish holidays at the Trial. Rubinstein insulted Spitz by refusing to accommodate Spitzes' request the court for a adjust the trial dates to accommodate Spitz. Rubinstein ultimate failed engage Spitz to testify against the government's auditor Riley and the CASI Accountant Hayes. Dunlevy had prepared extensive forensic exhibits and analysis of CASI spending and Karron funding that Counsel refused pay for and pay attention to.

24. Rubinstein tells Dunlevy to come to court but does not tell her not to attend sessions

Rubinstein instructed Dunlevy to come to court but did not specifically tell her NOT to come into the courtroom while court is in session.²¹⁴ The prosecution cites Dunlevy's presence in the courtroom while the trial is in session. While the judge accepts Dunlevy as an 'expert in retrospect', the Prosecution argues she is poisoned as a witness because she heard testimony from other witnesses. The court denied Rubinsteins' late request for new expert witnesses Dunlevy.²¹⁵ Despite the preparation of many charts and graphs showing loans balances, daily grant balances, percentage variance, and budget under and over figures to rebut the governments' clearly self-contradictory exhibits, Rubinstein fails to enter anything other than a few checks and receipts. Rubinstein submitted registers of other spending accounts late as the trial closes. Dunlevy cites Rubinstein's rudimentary understanding of the accounting issues directly led to his failure to understand the issues of the ATP co-funding.

²¹⁴ Trial Transcript Page 1168 Line 2-3

²¹⁵ Trial Transcript Page 1173 Line 19

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25. Rubinstein insults witnesses and supporters

Rubinstein insulted more than just the forensic accounting consultants by not paying them or using their already proffered work products. Witnesses reported to the Defendant that they were treated poorly. While serving as a defense witness requires standing by until called by the defense lawyer, witnesses reported difficulty contacting Rubinstein or his assistant to get a reference to when they needed to make themselves available to testify. Rubinstein also failed to spend any time with witnesses to prepare them for possible prosecution questions.. Witnesses walked directly into prosecution trap questions about Karron's business practices they should have been prepared to answer.

(47) Witnesses on Transgender Benefits under CASI Benefits plan not called

Many witnesses about transgender benefits were recruited, but not were called, but should have. Many supporters made donations of hundreds of thousands. Rubinstein derided donors for not contributing tens of thousands of dollars, causing some donors to report to Karron that they felt insulted and others to decline to donate to Rubinstein. More than one friend and prospective donor reported to Karron that Rubinstein had insulted them. Clearly, Rubinstein's conflict over court funding overflowed to private Karron defense funders withdrawing support.

28)The trial Jury should have had an alternative exculpatory defense forensic counter-exhibits

The jury was given only the Prosecutions faulty exhibit of CASI mis-spending without a counter exhibit on which to base any theory of innocence upon. Rubinstein was betting the clients life that the jury would disregard the law and jury instructions and find the client innocent based on lack of intent, despite being instructed to disregard intent. **Without intent, and with only the Prosecution evidence presented, even the defendant, had she been a member of the jury, would have been obliged to find herself guilty.** Given the evidence presented and the jury instructions, the jury had no choice but to find the defendant guilty because they were not given any alternative theory or evidence of co-funding. Ineffectiveness must be assumed because of this actual conflict of interest between the client and the counsels preservation of his fee created an irreconcilable conflict between counsel and the defendant.

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1) Standards for IAC met by Rubinsteins' representation of Karron

The defendant has a right to expect that his attorney will use every skill, expend every energy, and tap every legitimate resource in exercise of independent professional judgment on behalf of defendant and in undertaking representation.

Frazer v. US, 18 F.3d 778, 779 (9th Cir. 1994);

29) Rubinstein was Conflicted

Defense Counsel Rubinstein was conflicted in his representation of Defendant Karron. Instead of expending every energy, he refused to expend sufficient time and energy to prepare for the defense of the defendant. Because he was not happy with the rate that the apartment sale was proceeding, he bullied the client by refusing to confer with his client in preparation for the case. He further threatened his client by making application to the court to be relieved from the case he had engaged to defend. He compromised his own professional standards by focusing first on payment and second on the client, to his and his client's detriment. The real estate broker had to keep lowering the price below market value to satisfy the court and Rubinstein, to the detriment of the client.

30) Rubinstein performance was deficient by an objective standard

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. Strickland v. Washington, 466 US 668 (1984) 687

26. Rubinstein performance was sufficiently deficient to overcome presumption of reasonable professional assistance

There is a strong presumption that an attorney's conduct "falls within the wide range of reasonable professional assistance". *Id.* at 689. To establish prejudice, the defendant must show that there is "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 US 668 (1984) at 694

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The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, at 686.

- a. Rubinstein unprofessional errors, had they not occurred, would have changed the results of the proceedings*

The "defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case," *Strickland*, at 693, but rather "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, at 695-96.

Prejudice requirement does not require petitioner to prove that he would not have been found guilty. Prejudice in *pro se* motions is not strictly construed. In cases which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," ineffectiveness will be presumed under *US v. Cronin*, 466 US 648, 80 L.Ed.2d.657, 140 S.Ct. 2039 (1984).

- b. Rubinstein did not practice loyalty and avoid conflicts on interest*
c. Rubinstein did not sufficiently advocate the defendant's cause
d. Rubinstein did no consult the defendant on important developments prior to the trial
e. Rubinstein did not consult sufficiently with the client and the clients forensic team during the course of the trial
f. Rubinstein did not sufficiently bring to bear such skill and knowledge as will render the trial as a reliable adversarial testing procedure

The "Strickland Standard," of review of IAC performance consists of two parts:
 "In determining a claim of ineffective assistance of counsel, an appellant must show that:

- 1) Counsel's performance was deficient and that
- 2) deficiencies in performance prejudiced his defense ²¹⁶

A review of Counsel mistakes (deficiencies) must then must show how said mistakes harmed the client by having an adverse effect on case's outcome (prejudice).

²¹⁶ *Strickland v. Washington*, 466 US 668 1984 "The right to counsel is the right -to effective assistance of counsel."

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Not providing the jury with an alternate forensic theory was insufficient to overcome reasonable doubt of some kind of misappropriation of at least \$5,000.

A hearing must be held unless the claims are vague, wholly incredible, or even if true, would merit no relief. Claims can be made in a section 2255 motion or motion for new trial.²¹⁷

(48) Specific Failures of Counselor Rubinstein

- 31) Failure 1: Failed to provide a reasonable forensic accounting defense despite availability of ample forensic support by Spitz and Dunlevy
- 32) Failure 2: Failed to confront Hayes, especially with the wealth of forensic support he had available.
- 33) Failure 3: Failed to use his considerable skill in cross examination to impeach Hayes
- 34) Failure 4: Unreasonably bad defense strategy, especially in light of the Case Law, had he studied it prior to trial, and especially in light of the forensic support the Defendant had available.
- 35) Failure 5: Did not pursue clear Brady Violations
- 36) Did not Pursue issues in GX114
- 37) Did not use Forensic Schedules and Graphs provided for him by Dunlevy
- 38) Did not get all of the Spending accounts into evidence until the very end of the trial, where they served no purpose and would not help in an Rule 33 Motion or Direct Appeal

27. Grant suspended for non-compliance

After the NIST ATP grant was suspended for non-compliance, Karron visited Marilyn Goldstein, the NIST grants manager, to try work out how to get the project restarted and to explain the CASI side of the story. Goldstein was sufficiently impressed that she ordered a OIG Re-Audit²¹⁸. Karron engaged Melvin Spitz to represent CASI in the re-audit. Spitz handily reconciled and audited CASI.

Hayes had continued to meddle in CASI affairs while Karron was attempting to disengage from Hayes and paid the payroll out of pocket²¹⁹. Hayes seemly attempted to take

²¹⁷ Visciotti v. Woodford, 288 F. 3d 1097 - Court of Appeals, 9th Circuit 2002

²¹⁸ Declaration of Karron Exhibit <<CITATION>>

²¹⁹ Declaration of Karron Exhibit <<CITATION>>

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over CASI as paychecks started showing up with Hayes's name instead of CASI. Melvin Spitz, CPA to represented CASI at the second ATP audit revisit in December 2003.

28. Spitz re-creates CASI books without problem

Spitz had no problem reconciling a new set of spreadsheet CASI books. Hayes and Spring labored expensively and endlessly on trying to re-create CASI books without succeeding. Why ?

29. Karron re-engaged Feldman CPA to do the CASI Taxes

During this time, Karron re-engaged Jill Feldman to do the CASI taxes that Hayes had started but abandoned, and succeeded in filing 2001 corporate taxes. Dunlevy, working as a subcontractor, working in parallel but independently from Spitz, also recreated CASI books in Quick Books in order to do the corporate taxes, payroll taxes, and do an independent reconstruction of the CASI NIST ATP project.

1. Strange behavior from NIST ATP as a secret investigation is launched

The last correspondence from Snowden was cryptic, as it seemed to create an impossible condition "Payments would only count for costs incurred during the active program". NIST statutes allow accounting under the company's own standards, being cash or accrual. It seemed reasonable that using the cash to pay program payables would satisfy the immediate issue of co-funding and that the issues that the co-funding had actually been made already could be settled later.

Unknown to Karron was that the OIG Special Agents were already on the scene, called by Hayes, the accountant, and had fatally poisoned the project and halted all civil negotiations by June 2003.

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2. Karron visits NIST and Grants Manager Goldstein to get an Audit Resolution Conference

Karron visited NIST and met with Goldstein face to face. A long memorandum was explained what happened. A re-audit visit was made in December 2003 by Riley and she met with the successor NIST Auditor Melvin Spitz, a specialist in audit disputes. Riley spent a week in Spitz's office, and her exit interview was upbeat and positive. She told Spitz to the effect that "I see no reason this project can be re-started".²²⁰ Karron continued the research out of pocket, with borrowed money. As Prof. Cox was already working for CUNY, he continued working *pro bono*. As Rothman would be otherwise unemployed, Karron kept his payroll going out of pocket on the misplaced hope that NIST would resume funding. This would not happen.

39) Draft audit report issued

The Draft audit report was issued and completely contradicted Riley's exit interview. Strangely, the draft and final audit report reverted to Hayes payroll numbers, by the pattern of errors. Karron, with Spitz, wrote a rebuttal audit report, and Spitz was prepared to go to Washington for an Audit Resolution meeting.

40) NIST Clams Up and Formal OIG Investigation starts

Then NIST Grants managing people started acting very strange; They started telling Rothman and Spitz that they were not allowed to talk to CASI or Karron at all. Then, on October 25, 2004, Karron got a call from his best friend and investor, Lee Goldberg that "a group of federal agents with guns appeared at his house and were asking strange questions about Karron sexual proclivities. The OIG Special Agents had launched a criminal investigation unbeknown to Karron, without a formal 'Target Letter'²²¹ and for the next five years everyone in Karron's circle of friends and professional colleagues who worked on Digital Morse Theory would be sucked into a vortex of criminal investigation.

g. 2003 Dec Melvin Spitz CPA does CASI re-audit for second OIG Auditor field audit with Riley

²²⁰ As relayed to Karron by Spitz at the time.

²²¹ The US Attorney's Manual gives a sample letter as "We advise you that the Grand Jury is conducting an investigation of possible violations of federal criminal laws involving ..." None was ever issued in this case.

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Belinda Riley, the OIG auditor made a second field visit to CASI at Spitz office, where she worked for yet another week. Spitz by this time had deftly reconciled and re-audited the CASI finances. Riley reviewed this data in detail with Spitz over the course of her weeklong second visit. Her exit interview with Spitz was upbeat and she indicated that she now understood how the money flowed and that there was no problem restarting the grant. However, as we now know, the OIG agents were already on the scene and poisoned any resumption negotiations. In an e-mail message buried in the discovery, Orthwein said she was crying over this situation.²²²

3. Draft Audit report issued, Rebuttal Filed.

The Draft report was issued, and Karron and Spitz wrote a rebuttal to the issues raised.

4. The final OIG Audit report issued and formal Investigation launched

The Draft Audit Report Rebuttal requested an Audit Resolution Conference. The DOC OIG ordered ATP not to communicate with Karron and CASI, and especially not to make any actions that may be construed as a civil bill with CASI. This was only disclosed at Trial.

h. 2004 The OIG Final Audit report copies hostile Hayes Audit report figures including tell tail error "fingerprints"

Dunlevy and Spitz review the final OIG audit and come to the conclusion that Riley did not do the audit she promised, instead copied her audit figures from the hostile Hayes audit. Riley copied the errors as well, leaving a 'fingerprint' as to its origin, much like DNA evidence.

i. 2004 OIG targets Karron and interviews Goldberg

When the OIG Special Agents started interviewing Karron's friends and colleagues, one of them, Goldberg, called Karron to inform him that he had coercively interviewed by Special Agents with guns. Goldberg signed an exculpatory interview affidavit, but told of being asked completely inappropriate questions about *quid pro quo* for sex with the Defendant. Karron

²²² Orthwein

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started shopping for criminal counsel and the family agreed to help pay for the services of M. Scott Peeler then at the firm of Arent-Fox LLP.

j. 2005 Riley is awarded a Silver Medal in secret for unique jointly auditing CASI.

Unbeknown to Karron or counsel, the OIG auditor Riley is awarded 2005 DOC Silver Medal Award for Meritorious Federal Service

"For conducting a complex and unique **joint** audit investigation of costs claimed against a scientific research cooperative agreement awarded by NSIT [*sic*]." [emphasis added].

This was revealed when Riley's resume was submitted as an expert witness for the criminal trial. Under cross-examination Riley revealed she never reconciled the numbers she presented, and indeed virtually admits she did not do an audit of CASI.²²³ Rubinstein retired in disgust instead of having Riley completely impeached.²²⁴

41) June 2003 First OIG Audit

The first OIG field visit was in June 2003, and that resulted in the suspension of the CASI grant for, what at the time was cited as lack of co-funding. The then grants manager Snowden sent a letter requesting reimbursement of \$60,000. Karron borrowed approximately \$45,000 from various lines of credit and deposited the funds in the CASI NIST ATP program bank account. Karron then offered the fractional value of equipment already owned by CASI used in the project as in-kind funding (up to 30% of the total CASI contribution can be in-kind) Snowden, the NIST ATP grants specialist was informed of this fact and countered with the argument that "depositing money in a bank account would not count toward the co-funding requirement. Karron counted with the fact that there were well in excess of \$60,000 in payables that needed payment as of the date of suspension. Karron had the money in the bank and paid Program Payables, but this was never acknowledged by the OIG toward co-funding, but should have been.

²²³

²²⁴ Trial Transcript Page 811 Line 18.

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- 1) Department of Commerce OIG gets more aggressive as time runs out to indict

Sometime in 2007, as the clock was about to toll and render this 5 year investigation untimely, something was added into the mix of evidence the OIG was presenting to yet another AUSA that tipped the balance of evidence enough to convince the US Attorney's office that they could win this case.

(49) OIG Crossed the line as the Statute of Limitations was about to toll?

The Defendant believes the deciding factor that triggered the indictment was the willingness of the OIG to cross the professional prosecutorial ethics line into creating inculpatory evidence. During the five year investigation, The OIG Special Agents were interviewing and re-interviewing everyone connected with the Karron. Defense counsel Peeler was successfully convincing prospective prosecutors that there was no case. Some witnesses, from the evidence submitted at trial, were interviewed multiple times. Something happened during that period that convinced them to recant previous contemporaneous exculpatory e-mail and memos written during the grant and telling inculpatory stories 5 years later.

5. OIG Getting Witnesses 'on board'

From statements made by the Special Agents to prospective witnesses, they were told to 'get on board' because they had the CASI accountant and she had 'nailed' Karron. Witnesses were asked leading questions such as "were you paid to have sex with Karron", or "early investors were asked if they invested in Karron for sex". Exculpatory witnesses, generally PhD professionals who worked with CASI were intimidated into not talking to the Defense counsel when approached. The previous CASI bookkeepers were intimidated by leading questions into not providing exculpatory testimony. Relentless leading interviewing and re-interviewing winnowed the remaining witnesses into only those willing to tell the same inculpatory story. Tellingly, they told the story in the same way with the same words. Were they rehearsed and coached what to say ?

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42) 2005 M. Scott Peeler as first criminal attorney convinces 4 US Attorneys that no crime occurred.

CASI never won another federal project after the NIST ATP project. Scuttlebutt in the Washington DC beltway was that Karron was the target of an intense investigation. The Karron abandoned CASI and worked for ATK as a staff scientist for 3.5 years doing military Traumatic Brain Modeling and research. Karron could not apply for Secret Clearance during this time because of the ongoing investigation by the OIG. During the 4 years he represented the Defendant he had a team of paralegals collate and organize the myriad of government issues with the terabytes of defense data. This culminated in a site visit to CASI with NIST computer experts who were apparently satisfied that CASI was legitimate and doing advanced computer research, 4 years after the project suspension.

1) 2007 ATP is terminated by Congress

NIST ATP program had a remarkable history of being sat on by Congress and yet repeatedly returning to life, to grant innovative ideas direct funding to benefit American Innovation. However, this program had enemies, much as Karron would discover she had enemies. Perhaps this termination prompted the OIG to indict Karron; there would be no one left at ATP to defend or even remember the original exculpatory negotiations.

k. 2007 The statute of limitations closes in and Karron is indicted

The Statute of Limitation was closing in and something changed in the intensity of the OIG's pursuit of Karron. ATP was terminated. Many original staff left. Goldstein left. Orthwein retired. Stanley retired. We believe in their prosecutorial zeal, the OIG Special Agents crossed the line and started creating false inculpatory exhibits to convince prosecutors to indict Karron, and suppressed exculpatory evidence.

l. 2007 Peeler insists that Karron find substitute Criminal Trial Counsel

During the 4 years that Peeler had successfully held off the indictment of Karron, pressure was building within the OIG to get Karron, quite possibly at any cost. The ATP program was terminated, and the program staff were retiring or leaving NIST. Karron followed

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the advice of a former student and engaged a wonderful criminal lawyer with a stellar track record against the Federal Government, Ronald Rubinstein. Karron met with him and gave him a retainer. At that point, Karron owed Peeler some \$25,000.

m. 2008 Peeler hands Rubinstein the Karron case to enable Peeler to withdraw as counsel.

Prior to the indictment, it did not appear that this case would be expensive defend. There was an abundance of exculpatory forensic evidence. No one could argue that Karron intended to defraud the government, because Karron had so much records and e-mail pointing to the contrary.

n. Substitution of Counsel created conflict with Rubinstein

Peeler was an extraordinary expensive white-collar attorney who billed much more than Rubinstein did. Peeler had arranged site visits with predecessor AUSA's to CASI to show them that CASI was continuing to do research after the grant suspension and was not fraudulent, and had successfully battled indictment through a succession of prosecutors.

o. Rubinstein succeeds Peeler as Defense Counsel after a 5-year investigation

Predecessor counsel, R. Scott Peeler, ESQ had successfully held off indictment for 5 years by convincing a succession of Assistant US Attorneys that there was no crime until the statute of limitations on the case was about to run out in 2007. Rubinstein believed, and told Karron that no one could find. Karron guilty of a crime, mainly because of the obvious lack of intent and the long and deep forensic data trail.

6. What changed to convince the Department of Justice to prosecute?

Peeler discovered that the Department of Justice had accepted the Karron case for prosecution just as the Statute of Limitation was to have run out (tolled). Peeler explained to Karron that the only reason, Peeler believed, they had changed their corporate mind to indict was that they were willing to take a more aggressive stand. Peeler did not know, as we would learn after the trial, that the OIG had suppressed exculpatory evidence and created inculpatory exhibits

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(GX114). However, the OIG Special Agents were not numerate enough to realize that they could not just change numbers without changing other numbers and leaving tell tail clues. Just as the OIG Auditor could not just copy numbers from Hayes without also carrying along tell tail clues in Hayes unique pattern of errors. The fingerprints are in the numbers, not the bodies.

p. Rubinstein's fatal defense theory flaw defending on intent, not fact

Rubinstein did not realize that the tide in white collar criminal convictions had moved away from fraudulent criminal intent to a much thinner knowing intent, to a strict liability intent, without any reliance on the actor's mental state. This was the fatal flaw in Rubinstein's pricing of the case.

7. Hayes misappropriated payroll taxes and Karron takes the fall

No one at this point realized that the OIG was possibly colluding with the CASI auditor Hayes to cover tax withholding misappropriation by Hayes. The payroll taxes have been missing from the second year of the grant. Was Hayes granted immunity for the perfect crime by setting up Karron?

q. 2007 All of Karron's computers and evidence is seized by OIG Special Agents

Then in June 2007 indicted Karron and the OIG seized all of Karron's computers and evidence. The cost of the defense then skyrocketed.

8. Rubinstein was blindsided by the OIG seizure of Karron's defense data in the computers

Rubinstein had already accepted Karron as a client when the OIG seized all of Karron's records prior to the trial. Karron had to sell her apartment and pay \$30,000 to recover her computers, and apply to the court to pay Rubinstein from the apartment sale, and then had to buy and build new computers on which to reconstruct her own data. Karron lost her job at ATK. Karron on unemployment from April 2008 until reporting to prison in 2009 Karron became homeless and destitute at the start of the criminal trial, and had to move in with her decrepit mother..

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9. Rubinstein Failure to Confront Hayes

Rubinstein failed to confront the hostile CASI /KARRON accountant and ATP auditor Hayes, who initiated this mess. He also failed to realize Hayes' own culpability for creating an enduring tax mess for Karron by misappropriating the second year withholding taxes in a botched noviation from an INC to an LLC.

10. Karron unable to file Taxes or Respond to IRS collateral investigation

Because Karron was a target of a criminal investigation, Peeler advised Karron NOT to file taxes, which could then pierce the 5th Amendment veil against self-incrimination. This rendered Karron unable to defend herself against the IRS investigation into the missing payroll taxes from the ATP project.

- 1) The CASI whistleblower auditor and accountant Hayes was too dirty to testify.

When prosecution withdrew Hayes as a witness against Karron, Counsel should have called her to the witness stand as a hostile witness and confronted her with the myriad of falsehoods and lies she promulgated against Karron to protect her own career. But he did not. However, he should have. This failure to confront ("**Confrontation Clause**") should have, at the very least resulted in the withdrawal of all Hayes authored or related based evidence. As we show, this would also include the OIG Audits, which were copied from Hayes with their Deficient Numerical Analysis ('D.N.A.') fingerprint of errors.

11. Rubinstein failed to master key details of case

Rubinstein needed an inordinate amount of coaching from Dunlevy and Karron for this case. Key forensic accounting details just bounced off of him. He just would not seem to understand certain key issues in GAAP (Generally Accepted Accounting Principles).

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12. Rubinstein dangerously computer and accounting illiterate

Rubinstein was also dangerously computer illiterate. Rubinstein threatened Karron and made Karron promise never to send Rubinstein a text message again. Rubinstein did not know how to read text messages and was too embarrassed to ask Karron for help. Rubinstein never read his own e-mail; the open secret was to get e-mail to Rubinstein one had to e-mail his wife. Rubinstein also never learned to use a spreadsheet. He insisted on doing all of the arithmetic by long hand on scratch paper. Rubinstein, to his credit, did notice the discrepancies in GX114 but the labor to do so was exhausting and cost many hours of Rubinsteins and his staff's time.

13. Dunlevy tried to brief Rubinstein on key forensic details

Dunlevy had prepared forensic reconstructions and analysis, but Rubinstein could not understand then unless he laboriously redid the addition on a yellow scratch pad. He never learned to use a spreadsheet and could not personally verify all of Dunlevy's spreadsheets by hand. He never should have taken this white collar case if he could not read standard forensic analysis and spreadsheets. Dunlevy made charts and graphs which also bounced off of Rubinsteins understanding and consciousness.

14. Rubinstein cognitive blocks noted by other witnesses

Other Karron supporters and witnesses would notice and report that no matter how many times they told Rubinstein facts in the case, he never seem to understand certain kinds of facts. Repeating facts and evidence did not help. Rubinstein grasped certain kind of storyboard and timeline facts, but was indurate to exculpatory fiscal principles.

15. OIG coached and coerced witnesses to 'get on board'

The OIG coached witnesses to tell the same story against Karron knowingly disobeying the 'law' of NIST ATP rules and statutes. Later witnesses would relate to Karron, post-

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conviction that they were 'asked' to 'get on board' against Karron, and some felt coerced to do so.

43) Rubinstein bets and loses Karron's career

That the OIG was willing to withhold exculpatory information, threaten exculpatory witnesses, and coerce inculpatory witnesses, if not create inculpatory evidence was not known to the defense. Rubinstein was not prepared for this depth of prosecutorial zeal.

This significantly increased the cost of defense beyond what was estimated by Rubinstein. Rubinstein bet and lost he could defend Karron on lack of intent defense cheaply and without expensive subcontracting any forensics support. Rubinsteins' cheap streak surfaced when

- 1) Rubinstein failed to mount a forensic accounting based defense
 - a. instead relied solely on "lack of intent to defraud based defense". This was a serious error, in that he ignored the body of case law derived from *Urlacher* that intent was not an element in a successful conviction.
 - b. This did not overcome the 'knowing' standard common in recent criminal convictions.
- a. *Rubinstein decided \$100,000 awarded by the court was insufficient to mount adequate defense forensic*
- b. *Rubinstein failed to do any discovery, recycled only on prosecution data, did not study defense provided forensic data.*
- c. *Missed Accountant Auditor Exculpatory Prepared Tax Returns.*
- d. *Did not acknowledge Co-Funding, or Karron Salary.*
- e. *Bored and confused Judge and Jury.*
- f. *Key points were lost on Judge and Jury.*
- g. *Did not push for Tracing of Funds requirement when objected to by judge.*
- h. *Because co-funding issue was not pursued,*
- i. *Court did not have any foundation on which to base a decision to permit funds tracing.*
- j. *Did not push to Examine Joan Hayes CPA when withdrawn as expert witness by Prosecution.*
- k. *Her confusing and contradictory evidence trail.*
- l. *Key stupid comments by Frank Spring were stricken from record and not objected to or pursued. "I have a PhD in Cost Principles"*
- m. *Did not pursue Government Auditor Riley on failure to audit.*
- n. *Did not pursue contradictions in GX114 despite acknowledgement by Court of problems.*

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- o. *Did not raise issue of missing year two withholding taxes when prosecution offered to not raise issues from Year 2;*
- p. *Hayes misapplied/stole the withholding taxes.*
- q. *Distinguishing URLACHER*

15 Urlacher testified only about minor expenditures for legitimate police purposes. These expenditures only totaled approximately \$10,000, a small fraction of the \$313,868.81 that was missing. No evidence was introduced to show that the rest of the money was spent for legitimate purposes, and therefore, there was simply not an evidentiary foundation for the jury to find in Urlacher's favor on the basis of his proposed §666(c) instruction. Judge Telesca properly refused the charge on the grounds that there was no basis in fact for the jury to conclude that the statutory exception applied to exempt Urlacher from criminal liability.²²⁵

6 Conclusion

The statutory standard for to set aside of a criminal verdict under 2255 requires demonstration that Karron's conviction resulted from at least one fundamental defect resulting in a complete miscarriage of justice.

Two fundamental defects resulted in an otherwise straightforward defense of Karron.

- Ineffective Assistance of Counsel: Rubinstein choose the unreasonably wrong defense strategy. He ignored a strong fact driven hard number forensic defense. Instead, he opted for a soft intent based defense weak on facts. Had he studied *Urlacher*, and other more modern white collar convictions, he would have realized the prosecution would win on a strict liability standard, despite the best of intentions on the part of the Defendant. Rubinstein had at his disposal two forensics experts (Spitz and Dunlevy) with years of experience with the critical forensic numbers. He would have learned at the start of the trial that the OIG inculpatory figures were fantasy. Rubinstein was too conflicted over reducing costs to share his fee with experts who could have won the case for him.
- Brady Violations: After trial, additional forensic analysis of all of the Government Exhibits showed that the Government withheld key exculpatory evidence and witnesses affidavits, as well as potential exculpatory witnesses from the Defense, in violation of the *Brady v Maryland* doctrine.

The miscarriages of justice this resulted in are

- The defendant was convicted of "misappropriating" her own money in support of a government program.

²²⁵ US of America, Appellee, v. Gordon URLACHER, Defendant-Appellant. 979 F.2d 935 -

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- The defendant was convicted of “knowingly” spending money for purposes for which she knew she in fact had permission to do so, had the written permission not been suppressed and in the support of subornation of inculpatory perjury by government witnesses.

For these reasons, justice demands this verdict to be set aside.

Further, justice cries out for an investigation of the real facts reveal the true cause of this unfortunate situation come to light.

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7 APPENDIX

(1) Grounds Summary from A0243 MOTION FORM

(50) Arguments for Relief in Summary

Ground One) (Ineffective Assistance of Counsel), Defendant was convicted for spending own funds.

Ground Two) (Ineffective Assistance of Counsel) Defendant was convicted of spending that was within budgetary authority to do so.

Ground Three) (Brady v Maryland violation) for withholding evidence of allocations and reclassifications

Ground Four) (Ineffective Assistance of Counsel) Wrong Defense Strategy and Conflict of Interest Claims

1) Grounds One

1) Defendant A0243 Statement

Personal earned salary and wages, budgeted, advanced and tax paid, are personal property of Karron. These were the funds used by Karron to pay project overhead and personal costs. Evidence consists of (but not limited to) approved budgeted Personnel Salaries/Wages cost line A, contemporaneous signed time sheets, signed paychecks, withholding shown on paychecks, withholding tax transmittal checks and forms (state and federal), quarterly withholding tax returns (State and Federal), and journal entries on CASI books and adjustments on withholding tax returns made in subsequent quarters. Finally, the rent paid by CASI, using after tax Karron funds, forwarded to CASI, written on CASI general corporate funds and drawn on CASI corporate checks, payable to Karron, were reclassified as Salary by the government in its own exhibit Ex 114. Karron was convicted mainly if not exclusively by Exhibit 114 but analysis of the numbers did not reveal this fact until after the trial and was not part of any appeal.

r. Defendant A0243 Reason not Issues not Directly Appealed

Appeals attorneys were constrained by the lack of forensic evidence and analysis by the two forensic expert witnesses standing by for the trial. Issues in ineffective assistance of defense counsel *vis-a-vis* failure of defense to mount forensic accounting defense detailed below.

2) Grounds Two

2) Defendants' A0243 Statement

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The total spending was within the acceptable statutory and ATP variation limits of plus and minus 10% between any budget categories. The main basis for Grounds two is that the base for the percentage variation must necessary and logically be the grant budget, not solely the government's funded amount, but the first year budget including co-funding and all direct costs and indirect costs. On that full the grant is within budget. If the change basis is the federal share advanced to date only, then most would be out of budget in the beginning, when the percentage basis is small and as the change base expanded, would gradually fall within budget as total spending accumulated.

s. Reason Issues not Directly Appealed

None

3) Grounds Three

1. *A0243 Statement*

The foundation of the Defendant's conviction rested on GX110 and GX114. GX114 does not add up, and appears to be made up. Hints of this were acknowledged by the trial judge, but the full extant was not known until after conviction with a comprehensive forensic accounting by Dunlevy, admitted into evidence in the collateral civil attack cited in the attached Memorandum of Fact and Law..

t. Reason Issues not Directly Appealed

Not previously raised.

4) Grounds Four

1. *A0243 Statement*

The defense counsel asked to be relieved of the case just prior to the start of the case for insufficient funding. The Defendants only significant asset, Karron's apartment was liened, and every computer, hard drive and laptop in the apartment were seized in a prior raid, without regard to the ownership of the equipment or its source (grant or personal funds). Because of that, the Karron had to pay 30,000 to a government computer forensic data recovery company to recover Karron's own business records and defense data from Karron's own computers. Karron had to build new computers to house and reconstruct the 10 terabytes of disk images from the Karron's company computer RAID (Redundant Arrays of Independent Disks). Defense counsel applied to be relieved from the case because of lack of sufficient payment. Karron's apartment was sold to fund data recovery, but the proceeds were insufficient to pay both the data recovery and the requested fee for counsel. Counsel did not engage the two forensic accounting experts brought in to audit and review the grant, did not challenge lack of tracing of funds requirement, and did not present alternative spending theory to counter Exhibit 114.

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u. Reason not Issues not Directly Appealed

These issues were not raised in the direct appeal because:

Appeals attorneys were selected by counsel, and they choose to attack the law rather than facts. When asked why in private conversations, both young attorneys stated they got too much work from defense counsel to go up against him in public and risk damaging their main referrer.

(2) RULES GOVERNING SECTION 2254 CASES IN THE US DISTRICT COURTS

The Rules²²⁶ address the following issues:

- Rule 1. Scope.
- Rule 2. The Petition.
- Rule 3. Filing the Petition; Inmate Filing.
- Rule 4. Preliminary Review; Serving the Petition and Order.
- Rule 5. The Answer and the Reply.
- Rule 6. Discovery.

Rule 6 of the Rules Governing §2255 Proceedings allows defendants as well as the government to conduct discovery pursuant to the Federal Rules of Civil Procedure - but only with permission from the court. The rule gives the district court discretion to grant discovery requests 'for good cause shown, but not otherwise'

- Rule 7. Expanding the Record
- Rule 8. Evidentiary Hearing
- Rule 9. not applicable as this is the first Petition
- Rule 10.** not applicable as this is the first Petition
- Rule 11.** not applicable as this is the first Petition.
- Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

(3) The NIST ATP Cooperative Agreement Budget

The CASI-NIST ATP cooperative agreement budget breaks down project costs in three different ways. They are

1. OBJECT CLASS CATEGORY

²²⁶ Revisions and notes are at Office of Law Revisions Counsel's website

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2. SOURCES OF FUNDS

3. TASKS

(1) OBJECT CLASS CATEGORY

There are 12 Object Classes under the Object Class Category (1) above.

Object Category A.	Personnel Salaries / Wages
Object Category B.	Personnel Fringe Benefits (34%)
Object Category C.	Travel
Object Category D.	Equipment
Object Category E.	Material / Supplies
Object Category F.	Subcontractor
Object Category G.	Other
Object Category H.	Total Direct Costs (Lines A through G)
Object Category I.	Total Direct Costs Requested from ATP
Object Category J.	Total Direct Costs Shared by Proposer
Object Category K.	Total Indirect Costs Absorbed by Proposer
Object Category L.	Total Costs (Lines H + K)

Here we focus on Line L, the Total Cost [of the entire project by year].

Line L (Total Cost) is the sum of lines H and K, i.e., the total direct costs of the project and the Total Indirect Costs absorbed by the Proposer (CASI in this case). Line K gives the total indirect costs as a line item, and restates that these costs are absorbed the proposer.

Line H (Total Direct Costs) is the sum of all of the Object Class Category items A through G. Lines I and J represent the source of funds to pay the costs in Line H. The Total Direct Costs are paid by funds from two sources, Line I, "Total Direct Costs requested from ATP" and Line J, "Total Direct Costs Shared by the Proposer". Each Line Item is broken out for Project Years (PY) 1, 2 and 3, as well as in Total.

(2) SOURCES OF FUNDS

A. ATP (Same as line I)	\$2,000,000
B. PI	110,500 [error]
C. PI Indirect	4,000
D. (not used)	
E. Total Sources of Funds (Same as Line L)	\$2,114,500

(3) TASKS

A. Server Hardware install and config	\$412,500
B. Public Client design mock-up	\$111,000
C. Program SpiderWeb surface gen	\$111,000
D. Recog. Sort Crits. Graph display	\$202,000
E. Write Union/Intersection operator	\$210,500

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F. Write Saddle Crit navigator/editor	\$210,000
G. Write DICOM, up/down load compres/crypt	\$210,500
H. Node Warping Code	\$214,500
I. Write Level of Detail Management Code	\$211,000
J. Install Clickstream technology on client	\$221,500
K. Total Costs of All Tasks (Same as Line L)	\$2,114,500

(4) NIST ATP Statute as of 2001**1. Sec. 15CFR295.1 Purpose**

[Code of Federal Regulations]
 [Title 15, Volume 1, Parts 0 to 299]
 [Revised as of January 1, 2001]
 From the US Government Printing Office via GPO Access
 [CITE: 15CFR295.1]

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PART 295--ADVANCED TECHNOLOGY PROGRAM--Table of Contents

Subpart A--General

Sec. 295.1 Purpose.

(a) The purpose of the Advanced Technology Program (ATP) is to assisted US businesses to carry out research and development on high risk, high pay-off, emerging and enabling technologies. These technologies are:

(1) High risk, because the technical challenges make success uncertain;

(2) High pay-off, because when applied they offer significant benefits to the US economy; and

(3) Emerging and enabling, because they offer wide breadth of potential application and form an important technical basis for future commercial applications.

(b) The rules in this part prescribe policies and procedures for the award of cooperative agreements under the Advanced Technology Program in

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order to ensure the fair treatment of all proposals. While the Advanced Technology Program is authorized to enter into grants, cooperative agreements, and contracts to carry out its mission, the rules in this part address only the award of cooperative agreements. The Program employs cooperative agreements rather than grants because such agreements allow ATP to exercise appropriate management oversight of

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projects and also to link ATP-funded projects to ongoing R&D at the National Institute of Standards and Technology wherever such linkage would increase the likelihood of success of the project.

(c) In carrying out the rules in this part, the Program endeavors to put more emphasis on joint ventures and consortia with a broad range of participants, including large companies, and less emphasis on support of individual large companies.

[62 FR 64684, Dec. 9, 1997]

2. Sec. 295.2 Definitions

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
From the US Government Printing Office via GPO Access
[CITE: 15CFR295.2]

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Subpart A--General

Sec. 295.2 Definitions.

(a) For the purposes of the ATP, the term award means Federal financial assistance made under a grant or cooperative agreement.

(b) The term company means a for-profit organization, including sole proprietors, partnerships, limited liability companies (LLCs), or corporations.

(c) The term cooperative agreement refers to a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal Government and the recipient is the transfer of money, property, or services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the recipient during performance of the contemplated activity.

(d) The term direct costs means costs that can be identified readily with activities carried out in support of a particular final objective. A cost may not be allocated to an award as a direct cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as an indirect cost. Because of the diverse

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characteristics and accounting practices of different organizations, it is not possible to specify the types of costs which may be classified as direct costs in all situations. However, typical direct costs could include salaries of personnel working on the ATP project and associated reasonable fringe benefits such as medical insurance. Direct costs might also include supplies and materials, special equipment required specifically for the ATP project, and travel associated with the ATP project. ATP shall determine the allowability of direct costs in accordance with applicable Federal cost principles.

(e) The term foreign-owned company means a company other than a US-owned company as defined in Sec. 295.2(q).

(f) The term grant means a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal Government and the recipient is the transfer of money, property, services, or anything of value to the recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the recipient during performance of the contemplated activity.

(g) The term independent research organization (IRO) means a nonprofit research and development corporation or association organized under the laws of any state for the purpose of carrying out research and development on behalf of other organizations.

(h) The term indirect costs means those costs incurred for common or joint objectives that cannot be readily identified with activities carried out in support of a particular final objective. A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as a direct cost. Because of diverse characteristics and accounting

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practices it is not possible to specify the types of costs which may be classified as indirect costs in all situations. However, typical examples of indirect costs include general administration expenses, such as the salaries and expenses of executive officers, personnel administration, maintenance, library expenses, and accounting. ATP shall determine the allowability of indirect costs in accordance with applicable Federal cost principles.

(i) The term industry-led joint research and development venture or joint venture means a business arrangement that consists of two or more separately-owned, for-profit companies that perform research and development in the project; control the joint venture's membership, research directions, and funding priorities; and share total project costs with the Federal government. The joint venture may include additional companies, independent research organizations, universities, and/or governmental laboratories (other than NIST) which may or may not contribute funds (other than Federal funds) to the project and perform research and development. A for-profit company or an independent research organization may serve as an Administrator and perform administrative tasks on behalf of a joint venture, such as handling receipts and disbursements of funds and making antitrust filings. The following activities are not permissible for ATP funded joint ventures:

(1) Exchanging information among competitors relating to costs,

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sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required to conduct the research and development that is the purpose of such venture;

(2) Entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such joint venture of any product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets; and

(3) Entering into any agreement or engaging in any other conduct:

(i) To restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture, or

(ii) To restrict or require participation by such party in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.

(j) The term intellectual property means an invention patentable under title 35, US Code, or any patent on such an invention.

(k) The term large business for a particular ATP competition means any business, including any parent company plus related subsidiaries, having annual revenues in excess of the amount published by ATP in the relevant annual notice of availability of funds required by Sec. 295.7(a). In establishing this amount, ATP may consider the dollar value of the total revenues of the 500th company in Fortune Magazine's Fortune 500 listing.

(l) The term matching funds or cost sharing means that portion of project costs not borne by the Federal government. Sources of revenue to satisfy the required cost share include cash and in-kind contributions. Cash contributions can be from recipient, state, county, city, or other non-federal sources. In-kind contributions can be made by recipients or non-federal third parties (except subcontractors working on an ATP project) and include but are not limited to equipment, research tools, software, and supplies. Except as specified at Sec. 295.25, the value of in-kind contributions shall be determined in accordance with OMB Circular A-110, Subpart C, Section 23. The value of in-kind contributions will be prorated according to the share of total use dedicated to the ATP program. ATP restricts the total value of in-kind contributions that can be used to satisfy the cost share by requiring that such contributions not exceed 30 percent of the non-federal share of the total project costs. ATP shall determine the allowability of matching share costs in accordance with applicable federal cost principles.

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(m) The term person shall be deemed to include corporations and associations existing under or authorized by the laws of either the US, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(n) The term Program means the Advanced Technology Program.

(o) The term Secretary means the Secretary of Commerce or the Secretary's designee.

(p) The term small business means a business that is independently owned and operated, is organized for profit, and is not dominant in the field of operation in which it is proposing, and meets the other requirements found in 13 CFR part 121.

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(q) The term US-owned company means a for-profit organization, including sole proprietors, partnerships, or corporations, that has a majority ownership or control by individuals who are citizens of the US.

[55 FR 30145, July 24, 1990, as amended at 59 FR 666, 667, Jan. 6, 1994; 62 FR 64684, 64685, Dec. 9, 1997; 63 FR 64413, Nov. 20, 1998]

3. Sec. 295.3 Eligibility of US- and foreign-owned businesses.

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
From the US Government Printing Office via GPO Access
[CITE: 15CFR295.3]

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Subpart A--General

Sec. 295.3 Eligibility of US- and foreign-owned businesses.

(a) A company shall be eligible to receive an award from the Program only if:

(1) The Program finds that the company's participation in the Program would be in the economic interest of the US, as evidenced by investments in the US in research, development, and manufacturing (including, for example, the manufacture of major components or subassemblies in the US); significant contributions to employment in the US; and agreement with respect to any technology arising from assistance provided by the Program to promote the manufacture within the US of products resulting from that technology (taking into account the goals of promoting the competitiveness of US industry), and to procure parts and materials from competitive suppliers; and

(2) Either the company is a US-owned company, or the Program finds that the company is incorporated in the US and has a parent company which is incorporated in a country which affords to US-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under the Program; affords the United States-owned companies local investment opportunities comparable to

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those afforded to any other company; and affords adequate and effective protection for the intellectual property rights of US-owned companies.

(b) The Program may, within 30 days after notice to Congress, suspend a company or joint venture from continued assistance under the Program if the Program determines that the company, the country of incorporation of the company or a parent company, or the joint venture has failed to satisfy any of the criteria contained in paragraph (a) of this section, and that it is in the national interest of the United States to do so.

(c) Companies owned by legal residents (green card holders) may apply to the Program, but before an award can be given, the owner(s) must either become a citizen or ownership must be transferred to a US citizen(s).

[59 FR 667, Jan. 6, 1994, as amended at 62 FR 64685, Dec. 9, 1997]

4. Sec. 295.4 The selection process

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
From the US Government Printing Office via GPO Access
[CITE: 15CFR295.4]

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Sec. 295.4 The selection process.

(a) The selection process for awards is a multi-step process based on the criteria listed in Sec. 295.6. Source evaluation boards (SEB) are established to ensure that all proposals receive careful consideration. In the first step, called ``preliminary screening,`` proposals may be eliminated by the SEB that do not meet the requirements of this Part of the annual Federal Register Program announcement. Typical but not exclusive of the reasons for eliminating a proposal at this stage are that the proposal: is deemed to have serious deficiencies in either the technical or business plan; involves product development rather than high-risk R&D; is not industry-led; is significantly overpriced or underpriced given the scope of the work; does not meet the requirements set out in the notice of availability of funds issued pursuant to

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Sec. 295.7; or does not meet the cost-sharing requirement. NIST will also examine proposals that have been submitted to a previous competition to determine whether substantive revisions have been made to the earlier proposal, and, if not, may reject the proposal.

(b) In the second step, referred to as the ``technical and business review,'' proposals are evaluated under the criteria found in Sec. 295.6. Proposals judged by the SEB after considering the technical and business evaluations to have the highest merit based on the selection criteria receive further consideration and are referred to as ``semifinalists.''

(c) In the third step, referred to as ``selection of finalists,'' the SEB prepares a final ranking of semifinalist proposals by a majority vote, based on the evaluation criteria in Sec. 295.6. During this step, the semifinalist proposers will be invited to an oral review of their proposals with NIST, and in some cases site visits may be required. Subject to the provisions of Sec. 295.6, a list of ranked finalists is submitted to the Selecting Official.

(d) In the final step, referred to as ``selection of recipients,'' the Selecting Official selects funding recipients from among the finalists, based upon: the SEB rank order of the proposals on the basis of all selection criteria (Sec. 295.6); assuring an appropriate distribution of funds among technologies and their applications; the availability of funds; and adherence to the Program selection criteria. The Program reserves the right to deny awards in any case where information is uncovered which raises a reasonable doubt as to the responsibility of the proposer. The decision of the Selecting Official is final.

(e) NIST reserves the right to negotiate the cost and scope of the proposed work with the proposers that have been selected to receive awards. For example, NIST may request that the proposer delete from the scope of work a particular task that is deemed by NIST to be product development or otherwise inappropriate for ATP support.

[63 FR 64413, Nov. 20, 1998]

5. Sec. 295.5 Use of pre-proposals in the selection process

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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[CITE: 15CFR295.5]

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Sec. 295.5 Use of pre-proposals in the selection process.

To reduce proposal preparation costs incurred by proposers and to make the selection process more efficient, NIST may use mandatory or optional preliminary qualification processes based on pre-proposals. In such cases, announcements requesting pre-proposals will be published as indicated in Sec. 295.7, and will seek abbreviated proposals (pre-proposals) that address both of the selection criteria, but in considerably less detail than full proposals. The Program will review the pre-proposals in accordance with the selection criteria and provide written feedback to the proposers to determine whether the proposed projects appear sufficiently promising to warrant further development into full proposals. Proposals are neither ``accepted'' or ``rejected'' at the pre-proposal stage. When the full proposals are received in response to the notice of availability of funds described in Sec. 295.7, the review and selection process will occur as described in Sec. 295.4.

[63 FR 64414, Nov. 20, 1998]

6. Sec. 295.6 Criteria for selection

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
From the US Government Printing Office via GPO Access
[CITE: 15CFR295.6]

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Sec. 295.6 Criteria for selection.

The evaluation criteria to be used in selecting any proposal for

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funding under this program, and their respective weights, are listed in this section. No proposal will be funded unless the Program determines that it has scientific and technological merit and that the proposed technology has strong potential for broad-based economic benefits to the nation. Additionally, no proposal will be funded that does not require Federal support, that is product development rather than high risk R&D, that does not display an appropriate level of commitment from the proposer, or does not have an adequate technical and commercialization plan.

(a) Scientific and technological merit (50%). The proposed technology must be highly innovative. The research must be challenging, with high technical risk. It must be aimed at overcoming an important problem(s) or exploiting a promising opportunity. The technical leverage of the technology must be adequately explained. The research must have a strong potential for

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advancing the state of the art and contributing significantly to the US scientific and technical knowledge base. The technical plan must be clear and concise, and must clearly identify the core innovation, the technical approach, major technical hurdles, the attendant risks, and clearly establish feasibility through adequately detailed plans linked to major technical barriers. The plan must address the questions of 'what, how, where, when, why, and by whom' in substantial detail. The Program will assess the proposing team's relevant experience for pursuing the technical plan. The team carrying out the work must demonstrate a high level of scientific/technical expertise to conduct the R&D and have access to the necessary research facilities.

(b) Potential for broad-based economic benefits (50%). The proposed technology must have a strong potential to generate substantial benefits to the nation that extend significantly beyond the direct returns to the proposing organization(s). The proposal must explain why ATP support is needed and what difference ATP funding is expected to make in terms of what will be accomplished with the ATP funding versus without it. The pathways to economic benefit must be described, including the proposer's plan for getting the technology into commercial use, as well as additional routes that might be taken to achieve broader diffusion of the technology. The proposal should identify the expected returns that the proposer expects to gain, as well as returns that are expected to accrue to others, i.e., spillover effects. The Program will assess the proposer's relevant experience and level of commitment to the project and project's organizational structure and management plan, including the extent to which participation by small businesses is encouraged and is a key component in a joint venture proposal, and for large company single proposers, the extent to which subcontractor/subrecipient teaming arrangements are featured and are a key component of the proposal.

[63 FR 64414, Nov. 20, 1998]

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7. Sec. 295.7 Notice of availability of funds.

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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[CITE: 15CFR295.7]

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Subpart A--General

Sec. 295.7 Notice of availability of funds.

The Program shall publish at least annually a Federal Register notice inviting interested parties to submit proposals, and may more frequently publish invitations for proposals in the Commerce Business Daily, based upon the annual notice. Proposals must be submitted in accordance with the guidelines in the ATP Proposal Preparation Kit as identified in the published notice. Proposals will only be considered for funding when submitted in response to an invitation published in the Federal Register, or a related announcement in the Commerce Business Daily.

[63 FR 64414, Nov. 20, 1998]

8. Sec. 295.8 Intellectual property rights; publication of research results

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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[CITE: 15CFR295.8]

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PART 295--ADVANCED TECHNOLOGY PROGRAM--Table of Contents

Subpart A--General

Sec. 295.8 Intellectual property rights; publication of research results.

(a)(1) Patent rights. Title to inventions arising from assistance provided by the Program must vest in a company or companies incorporated in the US. Joint ventures shall provide to NIST a copy of their written agreement which defines the disposition of ownership rights among the members of the joint venture, and their contractors and subcontractors as appropriate, that complies with the first sentence of this paragraph. The US will reserve a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the US any such intellectual property, but shall not, in the exercise of such license, publicly disclose proprietary information related to the license. Title to any such intellectual property shall not be transferred or passed, except to a company incorporated in the US, until the expiration of the first patent obtained in connection with such intellectual property. Nothing in this paragraph shall be construed to prohibit the licensing to any company of intellectual property rights arising from assistance provided under this section.

(2) Patent procedures. Each award by the Program shall include provisions assuring the retention of a governmental use license in each disclosed invention, and the government's retention of march-in rights. In addition, each award by the Program will contain procedures regarding reporting of subject inventions by the funding Recipient to the Program, including the

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subject inventions of members of the joint venture (if applicable) in which the funding Recipient is a participant, contractors and subcontractors of the funding Recipient. The funding Recipient shall disclose such subject inventions to the Program within two months after the inventor discloses it in writing to the Recipient's designated representative responsible for patent matters. The disclosure shall consist of a detailed, written report which provides the Program with the following: the title of the present invention; the names of all inventors; the name and address of the assignee (if any); an acknowledgment that the US has rights in the subject invention; the filing date of the present invention, or, in the alternative, a statement identifying that the Recipient determined that filing was not feasible; an abstract of the disclosure; a description or summary of the present invention; the background of the present invention or the prior art; a description of the preferred embodiments; and what matter is claimed. Upon issuance of the patent, the funding Recipient or Recipients must notify the Program accordingly, providing it with the Serial Number of the patent as issued, the date of issuance, a copy of the disclosure as issued, and if appropriate, the name, address, and telephone number(s) of an assignee.

(b) Copyrights: Except as otherwise specifically provided for in an Award, funding recipients under the Program may establish claim to copyright subsisting in any data first produced in the performance of

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the award. When claim is made to copyright, the funding recipient shall affix the applicable copyright notice of 17 USC. 401 or 402 and acknowledgment of Government sponsorship to the data when and if the data are delivered to the Government, are published, or are deposited for registration as a published work in the US Copyright Office. The funding recipient shall grant to the Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, perform publicly and display publicly, and for data other than computer software to distribute to the public by or on behalf of the Government.

(c) Publication of research results: The decision on whether or not to publish research results will be made by the funding recipient(s). Unpublished intellectual property owned and developed by any business or joint research and development venture receiving funding or by any member of such a joint venture may not be disclosed by any officer or employee of the Federal Government except in accordance with a written agreement between the owner or developer and the Program. The licenses granted to the Government under Sec. 295.8(b) shall not be considered a waiver of this requirement.

[55 FR 30145, July 24, 1990. Redesignated and amended at 59 FR 667, 669, Jan. 6, 1994; 63 FR 64414, Nov. 20, 1998]

9. Sec. 295.9 Protection of confidential information

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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Subpart A--General

Sec. 295.9 Protection of confidential information.

As required by section 278n(d)(5) of title 15 of the US Code, the following information obtained by the Secretary on a

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confidential basis in connection with the activities of any business or joint research and development venture receiving funding under the program shall be exempt from disclosure under the Freedom of Information Act--

(1) Information on the business operation of any member of the business or joint venture;

(2) Trade secrets possessed by any business or any member of the joint venture.

[55 FR 30145, July 24, 1990. Redesignated at 59 FR 667, Jan. 6, 1994]

10. Sec. 295.10 Special reporting and auditing requirements

[Code of Federal Regulations]

[Title 15, Volume 1, Parts 0 to 299]

[Revised as of January 1, 2001]

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[CITE: 15CFR295.10]

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Subpart A--General

Sec. 295.10 Special reporting and auditing requirements.

Each award by the Program shall contain procedures regarding technical, business, and financial reporting and auditing requirements to ensure that awards are being used in accordance with the Program's objectives and applicable Federal cost principles. The purpose of the technical reporting is to monitor ``best effort'' progress toward overall project goals. The purpose of the business reporting system is to monitor project performance against the Program's mission as required by

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the Government Performance and Results Act (GPRA) mandate for program evaluation. The audit standards to be applied to ATP awards are the ``Government Auditing Standards'' (GAS) issued by the Comptroller General of the US (also known as yellow book standards) and the ATP program-specified audit guidelines. The ATP program-specific audit guidelines include guidance on the number of audits required under

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an award. In the interest of efficiency, the recipients are encouraged to retain their own independent CPA firm to perform these audits. The Department of Commerce's Office of Inspector General (OIG) reserves the right to conduct audits as deemed necessary and appropriate.

[62 FR 64686, Dec. 9, 1997. Redesignated at 63 FR 64415, Nov. 20, 1998]

11. Sec. 295.11 Technical and educational services for ATP recipients.

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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Subpart A--General

Sec. 295.11 Technical and educational services for ATP recipients.

(a) Under the Federal Technology Transfer Act of 1986, the National Institute of Standards and Technology of the Technology Administration has the authority to enter into cooperative research and development agreements with non-Federal parties to provide personnel, services, facilities, equipment, or other resources except funds toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory. In turn, the National Institute of Standards and Technology has the authority to accept funds, personnel, services, facilities, equipment and other resources from the non-Federal party or parties for the joint research effort. Cooperative research and development agreements do not include procurement contracts or cooperative agreements as those terms are used in sections 6303, 6304, and 6305 of title 31, US Code.

(b) In no event will the National Institute of Standards and Technology enter into a cooperative research and development agreement with a recipient of awards under the Program which provides for the payment of Program funds from the award recipient to the National

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Institute of Standards and Technology.

(c) From time to time, ATP may conduct public workshops and undertake other educational activities to foster the collaboration of funding Recipients with other funding resources for purposes of further development and commercialization of ATP-related technologies. In no event will ATP provide recommendations, endorsements, or approvals of any ATP funding Recipients to any outside party.

[55 FR 30145, July 24, 1990. Redesignated at 59 FR 667, Jan. 6, 1994. Redesignated and amended at 63 FR 64415, Nov. 20, 1998]

20. Sec. 295.21 Qualifications of proposers

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
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Subpart B--Assistance to US Industry-Led Joint Research and Development Ventures

Sec. 295.21 Qualifications of proposers.

Subject to the limitations set out in Sec. 295.3, assistance under this subpart is available only to industry-led joint research and development ventures. These ventures may include universities, independent research organizations, and governmental entities. Proposals for funding under this Subpart may be submitted on behalf of a joint venture by a for-profit company or an independent research organization that is a member of the joint venture. Proposals should include letters of commitment or excerpts of such letters from all proposed members of the joint venture, verifying the availability of cost-sharing funds, and authorizing the party submitting the proposal to act on behalf of the venture with the Program on all matters pertaining to the proposal. No costs shall be incurred under an ATP project by the joint venture members until such time as a

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joint venture agreement has been executed by all of the joint venture members and approved by NIST. NIST will withhold approval until it determines that a sufficient number of members have signed the joint venture agreement. Costs will only be allowed after the execution of the joint venture agreement and approval by NIST.

[63 FR 64415, Nov. 20, 1998]

21. Sec. 295.22 Limitations on assistance

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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Subpart B--Assistance to US Industry-Led Joint Research and Development Ventures

Sec. 295.22 Limitations on assistance.

(a) An award will be made under this subpart only if the award will facilitate the formation of a joint venture or the initiation of a new research and development project by an existing joint venture.

(b) The total value of any in-kind contributions used to satisfy the cost sharing requirement may not exceed 30 percent of the non-federal share of the total project costs.

[62 FR 64687, Dec. 9, 1997]

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22. Sec. 295.23 Dissolution of joint research and development ventures

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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Sec. 295.23 Dissolution of joint research and development ventures.

Upon dissolution of any joint research and development venture receiving funds under these procedures or at a time otherwise agreed upon, the Federal Government shall be entitled to a share of the residual assets of the joint venture proportional to the Federal share of the costs of the joint venture as determined by independent audit.

23. Sec. 295.24 Registration

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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[CITE: 15CFR295.24]

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Development Ventures

Sec. 295.24 Registration.

Joint ventures selected for funding under the Program must notify the Department of Justice and the Federal Trade Commission under the National Cooperative Research Act of 1984. No funds will be released prior to receipt by the Program of copies of such notification.

[63 FR 64415, Nov. 20, 1998]

24. Sec. 295.25 Special rule for the valuation of transfers between separately-owned joint venture members

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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[CITE: 15CFR295.25]

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Development Ventures

Sec. 295.25 Special rule for the valuation of transfers between separately-owned joint venture members.

(a) Applicability. This section applies to transfers of goods, including computer software, and services provided by the transferor related to the maintenance of those goods, when those goods or services are transferred from one joint venture member to other separately-owned joint venture members.

(b) Rule. The greater amount of the actual cost of the transferred goods and services as determined in accordance with applicable Federal cost principles, or 75 percent of the best customer price of the transferred goods and services, shall be deemed to be allowable costs; provided, however, that in no event shall the aggregate of these allowable costs exceed 30 percent of the non-Federal share of the total cost of the joint research and development program.

(c) Definition. The term ``best customer price'' shall mean the GSA schedule price, or if such price is unavailable, the lowest price at which a sale was made during the last twelve months prior to the transfer of the particular good or service.

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[62 FR 64687, Dec. 9, 1997]

30. Sec. 295.30 Types of assistance available

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
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Subpart C--Assistance to Single-Proposer US Businesses

Sec. 295.30 Types of assistance available.

This subpart describes the types of assistance that may be provided under the authority of 15 USC. 278n(b)(2). Such assistance includes but is not limited to entering into cooperative agreements with United States businesses, especially small businesses.

[59 FR 670, Jan. 6, 1994]

31. Sec. 295.31 Qualification of proposers

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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[CITE: 15CFR295.31]

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Subpart C--Assistance to Single-Proposer US Businesses

Sec. 295.31 Qualification of proposers.

Awards under this subpart will be available to all businesses, subject to the limitations set out in Secs. 295.3 and 295.32.

[62 FR 64687, Dec. 9, 1997]

32. Sec. 295.32 Limitations on assistance

[Code of Federal Regulations]
[Title 15, Volume 1, Parts 0 to 299]
[Revised as of January 1, 2001]
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PART 295--ADVANCED TECHNOLOGY PROGRAM--Table of Contents

Subpart C--Assistance to Single-Proposer US Businesses

Sec. 295.32 Limitations on assistance.

(a) The Program will not directly provide funding under this subpart to any governmental entity, academic institution or independent research organization.

(b) For proposals submitted to ATP after December 31, 1997, awards to large businesses made under this subpart shall not exceed 40 percent of the total project costs of those awards in any year of the award.

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(c) Awards under this subpart may not exceed \$2,000,000, or be for more than three years, unless the Secretary provides a written explanation to the authorizing committees of both Houses of Congress and then, only after thirty days during which both Houses of Congress are in session. No funding for indirect costs, profits, or management fees shall be available for awards made under this subpart.

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(d) The total value of any in-kind contributions used to satisfy a cost sharing requirement may not exceed 30 percent of the non-federal share of the total project costs.

[62 FR 64687, Dec. 9, 1997]

**(5) CIRCULAR A-110 REVISED 11/19/93 As Further Amended
9/30/99²²⁷**

APPENDIX A - CONTRACT PROVISIONS

SUBPART A - General

(1) 1. Purpose.

This Circular establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. Federal awarding agencies shall not impose additional or inconsistent requirements, except as provided in Sections __.4, and __.14 or unless specifically required by Federal statute or executive order. Non-profit organizations that implement Federal programs for the States are also subject to State requirements.

(1) __.2 Definitions.

(a) **Accrued expenditures** means the charges incurred by the recipient during a given period requiring the provision of funds for: (1) goods and other tangible property received; (2) services performed by employees, contractors, subrecipients, and other payees; and, (3) other amounts becoming owed under programs for which no current services or performance is required.

(b) **Accrued income** means the sum of: (1) earnings during a given period from (i) services performed by the recipient, and (ii) goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

(c) **Acquisition cost of equipment** means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

5) GENERAL PRINCIPLES

²²⁷ http://www.whitehouse.gov/omb/circulars_a110

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33. A. Basic Considerations

1) 1. Composition of total costs.

The total cost of an award is the sum of the allowable direct and allocable indirect costs less any applicable credits.

2) 2. Factors affecting allowability of costs.

To be allowable under an award, costs must meet the following general criteria:

- a. Be reasonable for the performance of the award and be allocable thereto under these principles.
- b. Conform to any limitations or exclusions set forth in these principles or in the award as to types or amount of cost items.
- c. Be consistent with policies and procedures that apply uniformly to both federally financed and other activities of the organization.
- d. Be accorded consistent treatment.
- e. Be determined in accordance with generally accepted accounting principles (GAAP).
- f. Not be included as a cost or used to meet cost sharing or matching requirements of any other federally financed program in either the current or a prior period.
- g. Be adequately documented.

3) 3. Reasonable costs.

A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with organizations or separate divisions thereof which receive the preponderance of their support from awards made by Federal agencies. In determining the reasonableness of a given cost, consideration shall be given to:

- a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the organization or the performance of the award.
- b. The restraints or requirements imposed by such factors as generally accepted sound business practices, arms length bargaining, Federal and State laws and regulations, and terms and conditions of the award.
- c. Whether the individuals concerned acted with prudence in the circumstances, considering their responsibilities to the organization, its members, employees, and clients, the public at large, and the Federal Government.
- d. Significant deviations from the established practices of the organization which may unjustifiably increase the award costs.

4) 4. Allocable costs.

A cost is allocable to a particular cost objective, such as a grant, contract, project, service, or other activity, in accordance with the relative benefits received. A cost is allocable to a Federal award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

- (1) Is incurred specifically for the award.

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(2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received, or
 (3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

- a. Any cost allocable to a particular award or other cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.

5) 5. Applicable credits.

- a. The term applicable credits refers to those receipts, or reduction of expenditures which operate to offset or reduce expense items that are allocable to awards as direct or indirect costs. Typical examples of such transactions are: purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds, and adjustments of overpayments or erroneous charges. To the extent that such credits accruing or received by the organization relate to allowable cost, they shall be credited to the Federal Government either as a cost reduction or cash refund, as appropriate.
- b. In some instances, the amounts received from the Federal Government to finance organizational activities or service operations should be treated as applicable credits. Specifically, the concept of netting such credit items against related expenditures should be applied by the organization in determining the rates or amounts to be charged to Federal awards for services rendered whenever the facilities or other resources used in providing such services have been financed directly, in whole or in part, by Federal funds.
- c. For rules covering program income (i.e., gross income earned from federally supported activities) see Sec. __.24 of Office of Management and Budget (OMB) Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations."

6) 6. Advance understandings.

Under any given award, the reasonableness and allocability of certain items of costs may be difficult to determine. This is particularly true in connection with organizations that receive a preponderance of their support from Federal agencies. In order to avoid subsequent disallowance or dispute based on unreasonableness or nonallocability, it is often desirable to seek a written agreement with the cognizant or awarding agency in advance of the incurrence of special or unusual costs. The absence of an advance agreement on any element of cost will not, in itself, affect the reasonableness or allocability of that element.

7) 7. Conditional exemptions.

- a. OMB authorizes conditional exemption from OMB administrative requirements and cost principles circulars for certain Federal programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.
- b. To promote efficiency in State and local program administration, when Federal non-entitlement programs with common purposes have specific statutorily-authorized consolidated planning and consolidated administrative funding and where most of the State agency's resources come from non-Federal sources, Federal agencies may exempt these covered State-administered, non-entitlement grant programs from certain OMB grants management requirements. The exemptions would be from all but the allocability of costs provisions of OMB Circulars A-87 (Attachment A, subsection C.3), "Cost Principles for State, Local, and Indian Tribal Governments," A-21 (Section C, subpart 4), "Cost Principles for Educational Institutions," and A-122 (Attachment A, subsection A.4), "Cost Principles for Non-Profit Organizations," and from all of the administrative requirements provisions of OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and the agencies' grants management common rule.
- c. When a Federal agency provides this flexibility, as a prerequisite to a State's exercising this option, a State must adopt its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A-87, and extend such policies to all subrecipients. These fiscal

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and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable Federal statutory and regulatory provisions, costs are reasonable and necessary for operating these programs, and funds are not be used for general expenses required to carry out other responsibilities of a State or its subrecipients.

34. B. Direct Costs

1. Direct costs are those that can be identified specifically with a particular final cost objective, i.e., a particular award, project, service, or other direct activity of an organization. However, a cost may not be assigned to an award as a direct cost if any other cost incurred for the same purpose, in like circumstance, has been allocated to an award as an indirect cost. Costs identified specifically with awards are direct costs of the awards and are to be assigned directly thereto. Costs identified specifically with other final cost objectives of the organization are direct costs of those cost objectives and are not to be assigned to other awards directly or indirectly.

2. Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality where the accounting treatment for such cost is consistently applied to all final cost objectives.

3. The cost of certain activities are not allowable as charges to Federal awards (see, for example, fundraising costs in paragraph 17 of Attachment B). However, even though these costs are unallowable for purposes of computing charges to Federal awards, they nonetheless must be treated as direct costs for purposes of determining indirect cost rates and be allocated their share of the organization's indirect costs if they represent activities which (1) include the salaries of personnel, (2) occupy space, and (3) benefit from the organization's indirect costs.

4. The costs of activities performed primarily as a service to members, clients, or the general public when significant and necessary to the organization's mission must be treated as direct costs whether or not allowable and be allocated an equitable share of indirect costs. Some examples of these types of activities include:

- a. Maintenance of membership rolls, subscriptions, publications, and related functions.
- b. Providing services and information to members, legislative or administrative bodies, or the public.
- c. Promotion, lobbying, and other forms of public relations.
- d. Meetings and conferences except those held to conduct the general administration of the organization.
- e. Maintenance, protection, and investment of special funds not used in operation of the organization.
- f. Administration of group benefits on behalf of members or clients, including life and hospital insurance, annuity or retirement plans, financial aid, etc.

35. C. Indirect Costs

1. Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Direct cost of minor amounts may be treated as indirect costs under the conditions described in subparagraph B.2. After direct costs have been determined and assigned directly to awards or other work as appropriate, indirect costs are those remaining to be allocated to benefiting cost objectives. A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to an award as a direct cost.

2. Because of the diverse characteristics and accounting practices of non-profit organizations, it is not possible to specify the types of cost which may be classified as indirect cost in all situations. However, typical examples of indirect cost for many non-profit organizations may include depreciation or use allowances on buildings and equipment, the costs of operating and maintaining facilities, and general administration and general expenses, such as the salaries and expenses of executive officers, personnel administration, and accounting.

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3. Indirect costs shall be classified within two broad categories: "Facilities" and "Administration." "Facilities" is defined as depreciation and use allowances on buildings, equipment and capital improvement, interest on debt associated with certain buildings, equipment and capital improvements, and operations and maintenance expenses. "Administration" is defined as general administration and general expenses such as the director's office, accounting, personnel, library expenses and all other types of expenditures not listed specifically under one of the subcategories of "Facilities" (including cross allocations from other pools, where applicable). See indirect cost rate reporting requirements in subparagraphs D.2.e and D.3.g.

36. D. Allocation of Indirect Costs and Determination of Indirect Cost Rates

8) 1. General.

- a. Where a non-profit organization has only one major function, or where all its major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs and the computation of an indirect cost rate may be accomplished through simplified allocation procedures, as described in subparagraph 2.
- b. Where an organization has several major functions which benefit from its indirect costs in varying degrees, allocation of indirect costs may require the accumulation of such costs into separate cost groupings which then are allocated individually to benefiting functions by means of a base which best measures the relative degree of benefit. The indirect costs allocated to each function are then distributed to individual awards and other activities included in that function by means of an indirect cost rate(s).
- c. The determination of what constitutes an organization's major functions will depend on its purpose in being; the types of services it renders to the public, its clients, and its members; and the amount of effort it devotes to such activities as fundraising, public information and membership activities.
- d. Specific methods for allocating indirect costs and computing indirect cost rates along with the conditions under which each method should be used are described in subparagraphs 2 through 5.
- e. The base period for the allocation of indirect costs is the period in which such costs are incurred and accumulated for allocation to work performed in that period. The base period normally should coincide with the organization's fiscal year but, in any event, shall be so selected as to avoid inequities in the allocation of the costs.

(2)___14Special award conditions

If an applicant or recipient:

- (a) has a history of poor performance,
- (b) is not financially stable,
- (c) has a management system that does not meet the standards prescribed in this Circular,
- (d) has not conformed to the terms and conditions of a previous award, or
- (e) is not otherwise responsible,

Federal awarding agencies may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: the nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(3)___23Cost sharing or matching

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

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- (1) Are verifiable from the recipient's records.
- (2) Are not included as contributions for any other federally-assisted project or program.
- (3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.
- (4) Are allowable under the applicable cost principles.
- (5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.
- (6) Are provided for in the approved budget when required by the Federal awarding agency.
- (7) Conform to other provisions of this Circular, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a Federal awarding agency authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of (1) or (2).

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if (1) or (2) apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

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(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

(25) ____25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Federal awarding agency requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A-21, "Cost Principles for Educational Institutions," OMB Circular A-122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 Appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, Federal awarding agencies are authorized, at their option, to waive cost-related and administrative prior written approvals required by this Circular and OMB Circulars A-21 and A-122. Such waivers may include authorizing recipients to do any one or more of the following.

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient's risk (i.e., the

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Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Federal awarding agency provides otherwise in the award or in the agency's regulations, the prior approval requirements described in paragraph (e) are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. No Federal awarding agency shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j), do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from Federal awarding agencies for budget revisions whenever (1), (2) or (3) apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in Section ___.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When a Federal awarding agency makes an award that provides support for both construction and nonconstruction work, the Federal awarding agency may require the recipient to request prior approval from the Federal awarding agency before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, Federal awarding agencies shall require recipients to notify the Federal awarding agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Federal awarding agency indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, Federal awarding agencies shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency shall inform the recipient in writing of the date when the recipient may expect the decision.

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(26) Brady Cases and treatises

(1) Recent Brady Cases in Circuit Courts of Appeal

For recent Brady cases (not an exhaustive list) in which the Circuit Courts of Appeal granted relief, or criticized prosecutors for nondisclosures, see

US v. Robinson, 583 F.3d 1265 (10th Cir. 2009)(nondisclosure of mental health records of confidential informant requires vacating conviction);

Simmons v. Beard, 581 F.3d 158 (3d Cir. 2009)(suppression of evidence discrediting key witness violates due process);

Montgomery v. Bagley, 581 F.3d 440 (6th Cir. 2009)(suppression of police report undermining credibility of key witness violates due process);

US v. Lee, 573 F.3d 155 (3d Cir. 2009)(nondisclosure of back of hotel registration card suggesting defendant had registered in hotel required vacating conviction);

US v. Burke, 571 F.3d 1048 (10th Cir. 2009)(court greatly concerned that prosecutor's belated disclosure "encourages gamesmanship" and "creates dangerous incentives [to misconduct]" but defendant did not show material prejudice);

US v. Torres, 569 F.3d 1277 (10th Cir. 2009)(nondisclosure that confidential informant had been retained by government on two previous occasions required vacating conviction);

US v. Price, 566 F.3d 900 (9th Cir. 2009)(nondisclosure of extensive criminal history of key government witness requires vacating conviction);

Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009)(suppression of deal with key witness violates due process);

US v. Mauskar, 557 F.3d 219, 232 (5th Cir. 2009)(court "deeply concerned" at prosecutor's belated disclosure of key evidence and at prosecutor's justification which is

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“beneath a member of the Bar representing the US before this Court” but defendant failed to prove prejudice););

US v. Gibson, 328 Fed. Appx. 860 (4th Cir. 2009)(new trial ordered on some counts based on prosecutor’s discovery violation);

Harris v. Lafler, 553 F.3d 1028 (6th Cir. 2009)(suppression of evidence that key witness promised substantial benefits for his testimony);

US v. Triumph Capital Group, Inc., 544 F.3d 149 (2d Cir. 2008)((new trial ordered based on prosecutor’s “inexplicably withholding” material exculpatory and impeachment evidence);

US v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008)(nondisclosure of DEA reports materially prejudicial and new trial ordered);

Unite States v. Lopez, 534 F.3d 1027 (9th Cir. 2008)(prosecutor’s Brady violation “troubling” but motion for new trial denied);

D’Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2008)(suppression of several items of exculpatory evidence that substantially contradicts testimony of state’s only eyewitness);

US v. Rittweger, 524 F.3d 171, 180 (2d Cir. 2008)(Sotomayor, J.)(court “troubled” and “disappointed” by prosecutor’s belated disclosure of exculpatory evidence and prosecutor’s argument that evidence not material disingenuous but defendant failed to shop prejudice;

US v. Chapman, 524 F.3d 1073 (9th Cir. 2008)(prosecutor’s “unconscionable,” “willful,” and “bad faith” violation of discovery obligations and “flagrant” misrepresentations to court justified mistrial

US v. Zomber, 299 Fed. Appx. 130 (3d Cir. 2008)(prosecutor’s discovery violation requires reversal of conviction and new trial);

US v. Garcia, 271 Fed. Appx. 347 (4th Cir. 2008)(prosecutor’s failure to disclose key impeachment evidence not

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prejudicial because defendant's counsel uncovered information day before witness testified);

US v. Butler, 275 Fed. Appx. 816 (11th Cir. 2008)(suppression of impeachment evidence but no new trial);

US v. White, 492 F.3d 380 (6th Cir. 2007)(remanded for hearing on Brady violation but court observes that given conflicting statements, "US Attorney's word is worth considerably less");

Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008)(suppression of evidence of cooperation agreement with key witness);

US v. Jernigan, 492 F.3d 1050 (9th Cir. 2007)(en banc)(prosecutor suppresses evidence that other similar bank robberies were committed by someone after defendant's arrest who bore striking resemblance to defendant);

US v. Garner, 507 F.3d 399 (6th Cir. 2007)(belated disclosure of evidence used to impeach government's key witness violates due process);

US v. Velarde, 485 F.3d 553 (10th Cir. 2007)(suppression of evidence undermining credibility of key witness violates due process);

US v. Rodriguez, 496 F.3d 221 (2d Cir. 2007)(remanded for Brady hearing after prosecution witness admits lies in initial interviews and prosecutor seeks to avoid disclosure by not taking notes);

Trammel v. McKune, 485 F.3d 546 (10th Cir. 2007)(in theft prosecution, suppression of receipts linking third party to theft violated due process);

US v. Chases, 230 Fed. Appx. 761 (9th Cir. 2007)(no reversal but court admonishes prosecution for "shocking sloppiness" in carrying out its disclosure duty);

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Ferrara v. US, 456 F.3d 278 (1st Cir. 2006)(nondisclosure of recantation by key government witness was “blatant” and “so outrageous” as to undermine defendant’s guilty plea);

US v. Risha, 445 F.3d 298 (3d Cir. 2006)(suppression of evidence discrediting testimony of key witness violates due process).

(2) Brady Cases in District Court where relief was granted

For recent cases in the district courts (not an exhaustive list) where relief was granted based on Brady violations, see

US v. Shaygan, 2009 WL 989289 (S.D. Fla. 2009);

US v. Stevens, Cr. No., 08-231 (D.D.C. April 7, 2009)Docket No. 372);

US v. Jones, 620 F. Supp.2d 163 (D. Mass. 2009);

US v. Fitzgerald, 615 F. Supp.2d 1156 (S.D. Cal. 2009);

Cardoso v. US, 642 F. Supp.2d 251 (S.D.N.Y. 2009);

Hernandez v. City of El Paso, 2009 WL 2096272 (W.D. Tex.);

US v. Quinn, 537 F. Supp.2d 99 (D.D.C. 2008);

US US v. Freeman, 2009 WL 2748483 (N.D.Ill.)(prosecutor’s misconduct in allowing witness’s false testimony to materially prejudice defendants requires new trial);

Sykes v. US, 897 A.2d 769 (D.C. App. 2006).

(3) Professional and Popular Press reports on Brady Violations

Ken Armstrong & Maurice Possley, The Verdict: Dishonor, CHICAGO TRIBUNE, Jan. 10, 1999,

Historic Case Sent Ripples Through Legal Community, CHICAGO TRIBUNE, June 6, 1999,

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Win at All Costs, PITTSBURGH POST-GAZETTE, Nov. 24, 1998 (study of over 1,500 cases nationwide during past decade found hundreds of cases in which prosecutors intentionally concealed exculpatory evidence).

(27) GX 3 DoC FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS

October 1998 Edition

(3).03 Federal and Non-Federal Sharing

- a. Awards which include Federal and non-Federal sharing incorporate an estimated budget consisting of shared allowable costs. If actual allowable costs are less than the total approved estimated budget, the Federal and non-Federal cost share ratio shall be calculated as a percentage of Federal and non-Federal approved amounts. If actual allowable costs are greater than the total approved estimated budget, the Federal share shall not exceed the total Federal dollar amount as reflected in the Financial Assistance Award (CD-450) and Amendment to Financial Assistance Award (CD-451).
- b. The non-Federal share, whether in cash or in in-kind, is expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash or in-kind contributions. However, the Recipient must meet its cost share commitment over the life of the award.

(4).04 Budget Changes and Transfer of Funds Among Categories

- a. Requests for budget changes to the approved estimated budget in accordance with the provision noted below must be submitted to the Federal Program Officer who shall review them and make a recommendation to the Grants Officer. The Grants Officer shall make the final determination on such requests and notify the Recipient in writing.
- b. Unless the Recipient is subject to 15 CFR Part 24 and the Federal share of the budget is \$100,000 or less, cumulative transfers of funds of an amount above 10 percent of the total award must be approved by the Grants Officer in writing. This allows the Recipient to transfer funds among approved direct cost categories when the cumulative amount of such transfers does not exceed 10 percent of the current (last approved) total budget. The same criteria applies to the cumulative amount of transfer of funds among projects, functions, joint ventures, consortia, activities, and annual costs when budgeted separately within an award, except transfers will not be permitted if such transfers would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended. This transfer authority does not authorize the Recipient to create new budget categories within an approved budget unless the Grants Officer has provided prior approval.
- c. The Recipient is not authorized at any time to transfer amounts budgeted for direct costs to the indirect costs line item or vice versa, without written prior approval of the Grants Officer.

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(5).07 Tax Refunds

Refunds of FICA/FUTA taxes received by the Recipient during or after the award period must be refunded or credited to the DoC where the benefits were financed with Federal funds under the award. The Recipient agrees to contact the Grants Officer immediately upon receipt of these refunds. The Recipient further agrees to refund portions of FICA/FUTA taxes determined to belong to the Federal Government, including refunds received after the expiration of the award.

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8 Signature Page

Signed on this day April 28, 2011

Long Beach, New York

Daniel B. Karron
Petitioner *pro se*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- v. -

DANIEL B. KARRON,

Defendant.

08 Civ. 10223 (NRB) (DFE)

DECLARATION OF ERIC A. EISEN,
ESQ. IN RE OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

I, ERIC A. EISEN, ESQ, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury as follows:

1. My name is Eric A. Eisen. I am a principal of the law firm of Eisen & Shapiro, which is located at 10028 Woodhill Road, Bethesda, Maryland 20817.
2. I am admitted to practice law in the District of Columbia and Maryland. I am also admitted to practice in several United States District Courts, Courts of Appeal, and the United States Supreme Court.
3. Dr. Daniel Karron is an acquaintance of a friend of mine from childhood. I first met him shortly before his criminal trial and was asked to provide him help.
4. Dr. Karron had no funds to my knowledge and the last time I had been involved in any criminal matter was over thirty years ago. Based on this I was unable to provide him assistance.
5. Recently Dr. Karron asked me to review for accuracy a transcript he had prepared from a video of what he told me was a presentation made by a government agency and to certify the accuracy of excerpts he had transcribed from that video.
6. As a pro bono action and a service to the court and the administration of justice, I agreed to review the transcript, correct it, and certify the accuracy of the corrected transcript.
7. I was presented with a video and transcript excerpts. For each excerpt, I located the corresponding time in the video, listened to the speakers, and corrected the transcript so that it was as accurate as possible. I did not select the excerpts to be transcribed and I did not listen to

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what was said before and after the excerpts, focusing only on the accuracy of what was transcribed.

8. Because I did not know the names of the speakers, I omitted names, which Dr. Karron had sometimes placed in his draft. Where more than one person on the podium responded to a question, I reflected the multiple responses by putting more than one answer to a question in the order in which the answers were given.

9. The attached transcript is the result of that effort. It contains a total of 11 excerpts, each identified by the time reported on the video of when the excerpt begins. The identifiers, preceded by Dr. Karron's exhibit numbers, are:

115. 1:54:00

116. 2:02:45

117. 2:37:33

118. 2:42:26

119. 2:45:35

120. 21:51:30

121. 2:58:30

122. 2:59:30

123. 3:03:15

124. 2:28:27

125. 2:31:14

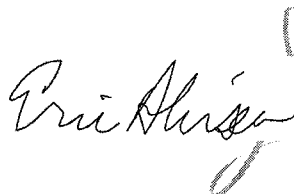
I certify that the attached transcription is accurate and complete as to the material it contains, with no elisions (except immaterial stuttering and the like such as are typically removed from transcripts) in the text produced.

SO SWORN:



Eric A. Eisen
Eisen & Shapiro
10028 Woodhill Rd.
Bethesda MD 20817
301-469-8590

August 30, 2009



Digitally signed by Eric A. Eisen
DN: cn=Eric A. Eisen, o=Eisen &
Shapiro, ou, email=eric@eisen-
shapiro.com, c=US
Date: 2010.08.30 22:35:02 -04'00'

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BEGINNING OF EXCERPTS

1:54:00

A: Well, now you're all experts in ATP, hopefully.

We are going to conclude with a few remarks. I'll ask my colleagues to approach the table for the Q and A section. Just to repeat a few comments the competition is currently open, we've announced on April 4, we are accepting proposals, again, in all technology areas, but we're also interested in receiving proposals in the 4 cross cutting areas of national interest, described earlier. Again, Let me repeat, that deadline at 3pm on May 21, is exact; no exceptions.

[...]

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2:02:45

Q: I have two quick questions.

First question is that if you're a single company, and I understand that the limit of the budget is 2 million dollars for three years, does that include the cost sharing that can be up to 30 percent. So...

A: The Federal share is limited to 2 million dollars.

Q: So that if you submit 2 million you can..., that doesn't count the cost sharing; you can add to that. Right? So the total budget is more than 2 million.

A: That's correct.

Q: Thank you.

Second Question. Is that you didn't mention about the fringe benefit could be looked at as direct for those companies in which that is normally counted as direct and not included for those companies that doesn't included include that. Is that in the regulations in the kit?

A: Well we stipulate in the budget that you can charge fringe benefits as a direct cost. However if your company normally charges them as an indirect, you have to leave them as an indirect and if you're a single company you will have to absorb those costs. And when your project is audited, the auditors will be looking to insure that you've charged the cost in the appropriate category.

Q: I see because that's a huge difference in the application. But anyway... it's in the kit that's stated. Thank you.

[...]

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Q: My question has to do with how broad your definition is of 'technology'. Our company works in medical informatics developing classification schemes, thesauri, mapping strategies, and then we subcontract out a lot of the computer work. Would our work qualify for an ATP proposal?

A: It can. We've actually funded a fair amount of in medical informatics. If you go to our web site and look under the funded projects you might see some examples. Basically you need to make it very clear to as to what..., where is the high technical risk and who is working on those high technical risk tasks so that it doesn't look like it is an entire pass through to the subcontractor for all the high technical risk issues. But you need to make the business case and the technical case as to why this is the best way to put a project together.

Ok so it is possible, but I think you have to make the case as to what is the technical risk . And what innovation approach do you have to overcoming those barriers.

Q: And who is assuming the technical risk, primary application and not the subcontractor?

A: Well, I think we like to see that it's not all in one place and not in the other. I think that we do get a little bit concerned if all the high-risk tasks are in the subcontractor and not in the primary awardee. But to be honest, you have to explain why that may be the only way to do this project. You know it really depends on your rationale based on how companies are structured in your business sector and how they construct their businesses, that might be the only way anybody could do it. You need to explain that to us as to why this approach is the best technical way to address the risks and innovation.

And I would encourage you to call one of our information technology folks; is there anyone in the room that could raise their hand that would love to chat with this guy later? Well, call Barbara Cuthill... and Ammet. Ammet is in the back there. So there will be

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some folks who can talk to you about that.

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Q: I have a two part question.

Part 1. If a small company is subcontracting with a university does the company have to cost share other than indirect costs?

A: The University or any subcontractors are allowed to charge indirect costs. It's the prime recipient that is submitting the proposal as a single company that is not allowed to charge indirect costs.

Q: Does the small company have to do cost sharing other than the indirect costs?

A: No. No they do not.

[...]

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2:42:26

Q: With a startup company, we are generally pretty lucky if we can accurately forecast what's going to happen in 96 hours in the future... if a...a sort of a two part question... How detailed does the planning have to be, if we reach a decision point, and we go A-B, or is it A-B-C and then second point is, How flexible is the funding if we end up pursuing some route that we didn't even envision to begin with.

A: OK, basically I would have to say on average, most decisions points in the technical plans, we rarely see people with more than two or three alternative directions. We are looking for where do you think are the highest priority things to go after that are also still consistent with our criteria of high risk and innovation

OK, so. basically what you can't do, or hope to do is, is 'OK we'll get to this decision point, and if it looks like we can't do A, which is the highest risk thing, we'll go right to B, which is product development,' because we'll say, 'Ah no you won't,' because we can't fund product development.

OK, so basically your alternatives that you might be considering in a decision point have to also be meritorious against the scientific and technological criteria.

Sometimes, though, things happen along the way, in a high-risk research project where you say 'You know ...' or something may have happened out in the community, that a new discovery that makes you want to rethink a particular direction or part of your proposal.

If you ever want to make a recommendation for a major technical scope change, depending on how major it is, sometimes companies have requested to suspend the project in order to stop the clock because we don't want your three years to run out while it gets evaluated and then they would send us in a 'This is how we would like to change the technical scope. Depending on how big of a change it is -it could be something that the technical and business project managers can evaluate and decide 'yes' or 'no'- they may decide they want additional peer review from federal technical folks to see if it still makes sense. And in a few cases, though it has happened rarely in ATP's history, sometimes

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we've had a oral review for that particular company on their major technical scope change to see if the SEB would have -if the Source Evaluation Board- would have selected it had it been submitted that way.

Because we want to see that whatever change that you propose is of equivalent or higher merit to the original proposal. So it depends on the scope change -how big it is, how much of a change- but we can accommodate those things, but sometimes it can take a suspension of the award in order to stop the time period and give us time to evaluate it. It's not a negative against you to suspend an award for that because it just stops the clock so you don't lose any of your time.

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A: [STANLEY] I would take one more crack at that. One of the things I pride myself on in this program and with my colleagues is that:

We try not to be too bureaucratic.

We are very supportive of the companies that win awards from us, and you actually have a management team that we assign, as Linda Beth has described.

So to the degree it maintains the true fidelity of the original proposal, in terms of the innovation and the risk, we recognize that, we're not going to give up on you if you can present appropriate evidence. It may have to go through various quick reviews, to make sure that you're not creating a whole new opportunity that we didn't hear of, because that would be unfair for people who have already gone through the process.

But it's not unusual for us to go through that process. It's not unique, and to the extent possible we all are in agreement that this would add strength to it, it's in line with general fidelity with the original proposal we certainly will do all we can with you giving us appropriate information to continue that project along. Because we have obviously determined that it has great value to our country.

And as for your future look in terms of the business plans things of that sort, we also understand, we don't expect you to be a gipsy ball reader either. So you have to indicate to us against the criteria, why and where, and what the commercial pathway is, but we have our own ways of reviewing that and we have ways of clarifying that with you before we make that award. But, we understand some of the things, nobody knows yet. But you should be able to nail some of those things because you know one of the real problems, and I've talked to a lot of VC is... well, is, inventors are wonderful people, particularly in the United States. Entrepreneurs are just wonderful to talk to. But there is a disconnect sometimes between clearly what the technology is going to be and how you are going to penetrate the market. The nuance in this program is we don't support basic science. There's lots of federal programs that do that. What we are interested in is capturing that innovation, defining the risk and the feasibility and the commercialization plan and

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having it getting to the market here, before anyplace else in the world, so we maintain increased US competitiveness and jobs etc. So, that's the gap we play in, and that's what you have to address in that proposal . You can ask very serious hundred thousand foot questions before you submit the proposal. If you don't completely understand what we have talked about today we welcome those opportunities to talk to you . The difference here is we can't write the proposal for you. But you can always ask for points of clarification. And you'll find many people, including the people I've got out in the employees lounge for those who are not staying here, that can highlight on some of the things we've talked about right now.

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2:51:33

Q: Yes please. Our product consists of three components.

One of them is the high risk - technically high risk- component, the other two are there is some risk, but not the same degree. So the first component is necessary [garbled] but not sufficient. I was wondering if, as part of the project, obviously that would be part of the project, would the development of the other two components, and more importantly, the integration of the all three components be fair game for the tasks of the project?

A: Absolutely.

Q: On both questions?

A: Yes.

It's very common for us to see..., that's one reason that a lot of companies do come to ATP, we are looking for the whole risk profile. But we're also looking for projects that where we define risk as not just the point risk but it's also if there's risk associated with that integration where it can fail, that's an element of risk that, you know, for example, maybe your components aren't that compatible with each other right now. Why is that? Why do you hope you can make them compatible So I think that we look at risk as not just by-component; We are looking at the whole profile of risk , of the whole project. So, there are often lower risk aspects of a project and higher risk aspects of a project. We want you to identify for us in each task where you think all the risks are, y'know high, medium, and low, something to that regard, because then we can evaluate the profile of the whole project.

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2:58:30

Q: [Unidentified Questioner 3] Yes sir, this is a cost-share question

Would you clarify the use of fringe benefits being part of or not part of your overhead rate.

I don't have my DCAA disclosure in front of me, here but I know that we typically will refer to fringes as part of our overhead but I also know that they are broken out as a separate line item in our disclosure. So how does that work?

A: It depends on how your..., you said you have a DCA ?

Q: Yes.

A: It depends on how they established it. If it is part of your indirect cost pool, you must charge it as an indirect cost and cannot charge it as a direct. We do allow it as a direct, because we do have a lot of small businesses, a lot of startups, who don't have big accounting systems and they are able to charge it as a direct expense.

Q: Thank you.

A: You're welcome. Strange new face.

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2:59:30

Q: I'll try to ask yet again another new question this time.

A: Go ahead.

Q: About past performance: The kit does not specify past performance as part of the evaluation criteria, either past performance with the NIST ATP or with other similar externally funded programs . So I'm wondering, is there in some subtle way, past performance factored into evaluations?

A: Well, in terms of evaluating your qualifications and experience I'd say in that context it does, but to be honest, from a real negative point of view, only if you have been debarred is that going to be a really negative thing overall. We are really just going to look at your experience based on how it relates to this award and do we think that you have the qualifications to perform the work that you're doing . Past federal awards might not have been in this area, so it really wouldn't be an indicator of whether or not you can perform research in this particular area. So we're looking for relevant experience and qualifications that relate to this proposal.

Q: So just as a quick follow up if we do have prior NIST ATP experience but it isn't necessarily relevant to this proposal, there's no need to include that in the write up. Is that what I'm hearing more or less?

A: I would say it's only relevant in terms of you know how to manage projects, you're good at managing, talking to your collaborators, and from that perspective if it's not specifically relevant to the R and D area that you're working on on this particular proposal , but you know we're looking at your business qualifications as well as your technical, so I think it can relate but having had a past ATP award doesn't necessarily mean you're more

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qualified for this award. OK? But you need to really make the case; what are the qualifications. 'cause sometimes we have had companies that have had more than one ATP award and for example a particular company would come to an oral review and they always would bring a particular scientist who is very eloquent in explaining the science and at one point we had to say 'OK, you've really explained it well but are you gonna really be the PI on this project, or as soon as it starts are you gonna be gone?' Alright? The old Bait and Switch on qualified personnel doesn't go over really well, so sometimes just putting a familiar face on a proposal if your intention is to not really have that person on it for the entire time won't go over very well. So we are looking for how are..., what are the best resources that you're allocating qualifications to this project.

Q: Let me do a favor here, in the effort to those who want to stay and talk to Dr. Uttag or want to go on and talk to my business people and some who are just, hungry. I'm going to say the remaining three are the remaining three. But all of us here, up on the table, there's a lot of program managers I see standing up at the back end of the auditorium, we're all going to be sticking around. But I think in order to make sure we cover all the parts we promised I'm going to limit these last three.

[...]

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3:03:15

Q: This question [is] about the personnel that can be involved with the project. Some startups spring out of university research. [Garbled] To what extent can they wear their hats as company personnel and at the same time retain their university affiliation and not be frowned upon on by NIST?

A: It depends on the rules of the university. If the university has no restrictions on employees having their own companies or doing work in other companies, and as long as they are employed by that company as well as the university, there is no problem. But it does depend on the university restrictions.

Q: Okay. So NIST doesn't have to specify how this going to be arranged?

A: Correct.

A: There can't be a conflict of interest between the two relationships so you have to really make sure there is no financial conflict of interest.

Q: So if its ok with the university, its ok with you?

A: It's actually addressed in the kit in more detail so we might want to find the page and it gives you the regulation to look at just to make sure there's no conflict of interest. So, for example if you're the small company and you're the professor and you're gonna come out here and have a company and then you wanna be able to subcontract back to your group that might..., we might ask a few questions cause we want to make sure there's really no conflict of interest, and that might not work out. Ok so it really depends on what your role is and do you want the university to be part of the project as well as your company . That's where it could get a little confusing and the kit actually does have some

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information on that to make sure that you avoid those conflicts of interest. Ok?

A: There are also codes of conduct standards in the federal regulations that I had up on the slides... 14 CFR..., 15 CFR Part 14; you may want to look at those.

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2:31:14

Q: I have two questions concerning budgets.

How much budget justification details are required? Do we have to explain also where we gonna get the money for indirect for small business.

A: You don't have to identify the source of your indirect costs unless you're getting on... on the 1262 page 3, in the middle portion of the page 3, it identifies the cost-sharing, so most of the companies do have it within their own company. But if you're getting it from state funding then you would identify the state.

[...]

END OF EXCERPTS

REPLY BRIEF

CORRECTED (“SUR”)

REPLY

MEMORANDUM OF

FACTS and LAW

PRO SE OFFICE
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USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>5/17/12</u>

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL B. KARRON

Petitioner,

-V.-

UNITED STATES OF AMERICA

Respondent.

File her 11-civ-1874 (RPP)
07-cr - 541 (RPP)

CORRECTED Sur-Reply
Memorandum of Fact and
Law in support of Petitioners'
28 U.S.C. §2255 Motion to
Vacate Criminal Verdict

(1) Introduction and Tables

The Defendant, D. B. Karron, responding *pro se* at this time, respectfully submits this corrected reply¹ to the Governments' "MEMORANDUM OF LAW IN OPPOSITION"² Rule 5(3)³ and in further support of the Petitioners' Resubmitted 28 U.S.C. §2255 motion to Vacate Criminal Verdict⁴ successfully submitted under Rule 3.

¹ RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, EFFECTIVE FEBRUARY 1, 1977, AS AMENDED TO FEBRUARY 1, 2010.. [Downloaded](#) Aug 1, 2011

² 11-civ-1874 Docket number [94](#) or [here](#) on 07/16/2011

³ Rule 5 (e) Reply. The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the Judge. *Ibid.*

⁴ 11-civ-1874 Version of April 28, 2011, cited in first paragraph of the governments reply brief (*above*) but not apparently re-docketed and available on PACER and as such not on RECAP. A copy is on [Google Docs](#).

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(.3) The Defendant respectfully petitions to move the court

The Defendant respectfully moves the Court under FRCP Rule 6⁵ to

- i. Conduct discovery (FRCP Chapter V *et seq*)⁶ and
- ii. Appoint counsel to assist in the
 - 1. Preparation of document production requests
 - 2. Prepare interrogatories
 - 3. Prepare requests for admissions
 - 4. Prepare depositions of witnesses.
 - 5. Organize the new findings for the court.
- iii. Prepare for a §2255 hearing(s)⁷

(.4) Discussion of Rule 6 and 7

Under Rule 7⁸, the trial record can be expanded with new evidence not previously admitted.

(.5) Specific Requests under Rule 6 and 7

Specifically, the Petitioner requests expansion of the record to include⁹ the following

- 1. The forensic reconstruction of Dunlevy¹⁰, particularly the twelve summary pages or “lead sheets”¹¹. This gives the total cost of the project as \$1,524,264¹²,

⁵ Rule 6. Discovery (a) Leave of Court Required. “A Judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the Judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. §3006A”. *ibid*.

⁶ Rule 6, *ibid*.

⁷ Rule 8. Evidentiary Hearing. (a) Determining Whether to Hold a Hearing. “If the petition is not dismissed, the Judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.” *ibid*.

⁸ Rule 7. Expanding the Record (a)

In General. If the petition is not dismissed, the Judge may direct the parties to expand the record by submitting additional materials relating to the petition. *ibid*.

⁹ But not limited to

¹⁰ Exhibit D or Docket 1:08-cv-10223 docket item 32 attachment 0 At 16 ff available from PACER or RECAP (free)

¹¹ Exhibit D. Dunlevys’ exhibit for this motion was apparently not docketed under these docket number 11-civ-1874 or 07-cr - 541. It was also used as an exhibit in the governments collateral civil attack docket 1:08-cv-10223 docket item 32 (2010-08-23). As DECLARATION of Deborah A. Dunlevy in Opposition re: ... (Additional

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of which the Federal Share is \$1,345,500¹³ and the CASI co-funding contribution was \$178,764.¹⁴

2. The forensic Analysis of Melvin Spitz, CPA, created for the Department of Commerce Audit Resolution administrative process¹⁵, which was mandated in Department of Commerce Department Administrative Order DAO 213-5^{16 17} but blocked by the OIG Special Agents¹⁸ escalation of this matter into a criminal investigation and prosecution.

attachment(s) added on 9/29/2010: as attachments 1 through 18, available on PACER or RECAP (free). See additional motion to correct record (Docket item 38 and the Judges orders in this regard at item 44

¹² Dunlevy Exhibit at AAC109 Line 18(Lead Sheet 9), BAC-227, BAC-310, BAC-375, BAC-535, CAC-180, CAC-202, CAC-211

¹³ GX62 at i (Exhibit at 10) Report ATL-16095-4-0002 August 2004. Even on the NIST final audit report, the total government disbursement is cited incorrectly as \$800,000 Year One and \$545,000 for Year Two, which is short \$500, for an incorrect total of \$1,345,000. The Browning Letter, Exhibit B, gives the total amount disbursed as \$1,345,500, and offers to disburse the remaining balance of \$54 500. Dunlevy concurs at Lead Sheet at AAC-109, BAC-160, BAC-227, BAC-305, BAC-309, BAC-375, BAC-493, BAC-509, BAC-535, CAC-201, CAC-211, . Spitz in GX62 Report ATL-16095-4-0002 August 2004 Audit Report Rebuttal and Appendix III at 14 of 38.

¹⁴ Dunlevy Exhibit Lead Sheet at AA-001-C, Dunlevys' Contribution figure includes Cash and Non Cash Contributions, such as statutory in-kind [15 C.F.R. §295.32] ((d) The total value of any in-kind contributions used to satisfy a cost sharing requirement may not exceed 30 percent of the non-federal share of the total project costs.") [15 C.F.R. §295.2(l)] "Sources of revenue to satisfy the required cost share include cash and in-kind contributions."), See also GX3 at 2 .3(b) ("Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash or inkind contributions. However, the Recipient must meet its cost share commitment over the life of the award.") contributions, Account Payables (and paid later)Spitz in the Appendix of GX62 gives a different, lower figure for the CASI cash only contribution out of Karrons' payroll at 79,474.18. This is still different from the Government's contention of zero CASI contribution at GX62 Report ATL 16095-4-0002 at 6. at trial it was revealed that the audit was never reconciled back to bank and credit card statements[Trial Transcript at 473 Line 24 Q. Did you do a bank reconciliation of the various bank accounts of CASI? A "For this audit ?" Q: Right A: No]

¹⁵ A copy of the Spitz report is included inGX62, the OIG Final Audit Report No. ATL-16095-4-0002 APPENDIX III at 14 of 38 (Exhibit at 47 starting from first at cover letter) but never acknowledged at trial, only after trial in Letter to Chambers from Rubinstein October 2,2008 following Rule 33 and 39 Oral Arguments).

¹⁶ Department of Commerce Department Administrative Order 213-5, AUDIT RESOLUTION AND FOLLOW-UP, Effective Date: 1991-06-21 Downloaded Sept 11, 2011 and gives exhaustive administrative civil remedies to resolve audit disputes and appeals to audit disputes.

¹⁷ Department of Commerce Office of Acquisition Management DEPARTMENT OF COMMERCE GRANTS AND COOPERATIVE AGREEMENTS, Version of 02 / 2002 downloaded on Sept 11, 2011 from ([N.B. Then current, now] "Obsolete INTERIM MANUAL",) D. Audit Resolution. 1. In accordance with Department of Commerce Office of [Acquisition Management DEPARTMENT OF COMMERCE] DAO 213-5, Department and operating unit personnel shall act promptly to resolve both the financial and nonfinancial issues raised in an audit report. Comments, arguments, and evidence (if any) submitted by the auditee and the operating unit shall be considered in resolving these issues. A DOC decision on the resolution of audit findings and recommendations will be made within 180 days of the issuance of an OIG audit report or OIG transmittal letter including findings and questioned costs reported by an independent accountant in accordance with the procedures and within the specified timeframes identified in DAO 213-5. 4. All disputes arising from audit resolution shall be decided in accordance with the appeal procedures and specified time frames outlined in DAO 213-5, and DOC's "Policies and Procedures for Resolution of Audit-Related Debts," as published in the Federal Register on January 27, 1989 (54 FR 4063).

¹⁸ Trial Transcript at 23 Line 19. RUBINSTEIN: [...] This is an e-mail from Rachel Garrison [OIG Special Agent] ... cc'd to a number of people,... and it says, "Additionally, please do not proceed with audit resolution for CASI. It's extremely important that a bill not be generated for the funds that CASI misappropriated from the award."

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3. The bankruptcy forensic accounting being sought by the newly appointed Trustee of the US Bankruptcy Court Neil H Ackerman, Esq¹⁹, who is engaging an forensic accountant to review Karron creditor claims including the IRS claims of missing payroll taxes and civil fines²⁰.

- iv. Conduct Discovery and Requests for admissions²¹ as to
 - 1. Total²² project costs²³ and total project spending²⁴,
 - 2. Karrons' salary, source²⁵ and how it was spent,
 - 3. Karron and CASI project payroll taxes paid and lost by CASI accountant and auditor Hayes²⁶,
 - 4. CASI NIST ATP cash co-funding, and in-kind contribution²⁷.
 - 5. Other program direct spending, such as ATP Payroll Fringes, Personal Master Card, Visa, American Express, PayPal and Accounts Payable, Personal Credit Card, Travel.
 - 6. CASI non program costs²⁸

¹⁹ Eastern District of New York, Central Islip, Bankruptcy Court, Case Daniel B Karron Docket #8-11-73479 Docket Entry 33 "Order Granting Application to Employ Ackerman Spence, PLLC as Attorney for the Trustee." (Related Doc # 32 application for Employment) Signed on 8/22/2011.

²⁰ Eastern District of New York, Central Islip, Bankruptcy Court, Case Daniel B Karron Docket #8-11-73479 Bankruptcy Claims #5(5-1) filed by Internal Revenue Service, total amount claimed: \$130,382.58 on 08/25/2011

²¹ FRCP Rule 36 **request for admissions** or a **request to admit** are a set of statements sent from one litigant to an adversary, for the purpose of having the adversary admit or deny the statements or allegations therein

²² ESTIMATED MULTI-YEAR BUDGET· SINGLE COMPANY OBJECT CLASS CATEGORY K and H

²³ Costs are out of pocket and invoiced costs in accrual basis.

²⁴ Spending is the payment of invoiced costs, prepaid costs not invoiced made by check, credit card, cash, transfer, etc.

²⁵ Where it came from.

²⁶ IRS Special Agent Debra Lynch been investigating this as one of a succession of IRS agents who have worked on this case (c.f. Dunlevy Declaration). Lynch has filed federal tax liens against CASI and Karron and is involved in the Karron bankruptcy (*above*).

²⁷ Co-Funding schedule was in negotiation with Snowden(see argument below) Spitz credited only cash. Dunlevy credited cash and in-kind, accounts payable and corporate and personal credit card accounts on an accrual basis. (15 C.F.R. §295) (see GX62 APENDIX III) (Contribution: Trial Transcript at 210 Line 1, at 239ff Line 3, at 270f Line 18, at 414 Line 25ff, at 343 Line 2, In-kind at 1061ff Line8, at 1073ff Line 11) Payments has been variously identified as "loan repayments", "loss offset" or ignored. Obscuring co-funding are the early 150,000 initial advance, which included a 75,000 payroll 'bootstrap payroll advance loan'. The purpose of this loan was to co-fund the project and payoff Karron debts. The court focused on repayment, but not the proceeds of the payment, and ultimately accepted the loans as repaid

²⁸ Non Program Non Overhead costs. Unfunded patent mandate(15 C.F.R. §295.8 (2) Patent procedures)(GAO Testimony "FEDERAL MANDATES", or things you never expected you would have to pay for yourself on your grant because the government has an interest in your intellectual property") (GX81 and GX110 at 21 of 37, GREEN CASI checks to Patent Lawyers (Levison, Lerner, Berger & Langsam and Pennie & Edmonds). Non Program travel for DARPA in Arlington Cited in Trial Transcript at 1263, 1268, 1283, 1287, as misappropriation along with Program Travel to NIST at Gaithersburg.

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- v. Conduct Discovery for undisclosed exculpatory material evidence evidencing the granting waivers for CASI use of ATP funds

Conduct Depositions of key material witnesses, specifically Belinda Riley, Joan M. Hayes, Hope Snowden, B J Lide, Jayne Orthwein, Marilyn Goldstein, Marc Stanley, Frank Spring, Deborah Dunlevy, Melvin Spitz, and other as the Court deems warranted.

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(2) Introduction: What is new in this case and why is it worth revisiting?

The main “new” evidence in this case²⁹ is arithmetic/math^{30 31}. This case is analogous to DNA exonerations³², where instead of new biochemical technique, “e-discovery” techniques are used in “extreme diligence”³³ to build hard, direct, irrefutable forensic evidence³⁴ in contradiction to the almost overwhelming trial chorus of circumstantial inculcation³⁵. The government’s case is based in “Junk Auditing”^{36 37 38 39} supporting circumstantial evidence from unqualified eyewitnesses later impeached⁴⁰ in trial and/or by contradiction here.

²⁹ Credit is due to extreme diligence on Dunlevy, Spitz and others’ part. One of the people who triggered this line of research was a comment by the Trial Judge Patterson himself at sentencing. Sentencing 1 Transcript at 56 Line 7 COURT: “This doesn’t show that the amounts taken for rent were part of the salary computation.” In this 2255 motion we show it was. Here we show it was. Karron Brief at 33. “10. The Explanation for the Karron Salary Line is to include Rent Checks”

³⁰ Perhaps in retrospect it is simple arithmetic and logic, and as such irrefutable in nature.

³¹ Like a scientific discovery, invention, innovation or advance, it is not obvious until revealed, discussed and comprehended; then it appears simple and straightforward.

³² Findley, Keith A., Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions (February, 09 2009). California Western Law Review, Vol. 38, No. 2, 2002. Available at SSRN: <http://ssrn.com/abstract=1340086> <<PITHY QUOTE>>

³³ See a long and hoary line case law articulating this concept starting with McLanahan v. Universal Insurance Company, 26 U.S. 1 Pet. 170 170 (1828) “whether the rule as to diligence, may not, in certain cases, be somewhat more strict, so as to require, what in Andrew vs. Marine Insurance Company is called “extreme diligence;” or what in Watson vs. Delafield is left open for discussion, as extreme diligence; ... We think, however, that the principle of the rule requires only due and reasonable diligence, (archaic citations omitted); Holland v. Florida, No. 09-5327 (U.S. 6/14/2010), 130 S.Ct. 2549 (2010) Due diligence does not require “the maximum feasible diligence” but it does require reasonable diligence in the circumstances

³⁴ Trial Transcript at 928 Line 22:[KWOK] And subsequent to that, we agreed to let defendant copy all the data on those computers. And so it is in their possession now, which they can review. [...] because we can’t simply review 60 percent of the total holdings of the Library of Congress without knowing where the stuff is.

³⁵ R. Br. at 1-9, in summary, consisted of 1) testimony from ATP officials Lide and Snowden about ATP rules and practices to Karron. 2) Further testimony from CASI management vehemently admonished Karron to stop violating these laws because of criminal consequences. In essence (from the R. Br.), A) Lide laid down the law and B) Snowden says no to all requests. However, this does not stand up to closer examination. Snowden was calling CASI “quite a few” (Trial Transcript at 423 Line 6) and would “discard the old form”(Trial Transcript at 420 Line 20) documents. Snowdens’ trial testimony is misleading, it being one side of a vigorous two-way debate in which permissions were granted as a new budget was being negotiated. Snowden granted oral and written waivers picked up in audit that were later suppressed by the OIG and disavowed by government staff. This is discussed in Exhibit E at 8 NIST ATP hated to say “no” and worked hard to find ways to say “yes” in support of their grantees. Missing is specific documentation to support specific denials in response to specific requests not granted. Exhibit E also at 6, lower “something that the technical and business project managers can evaluate and decide ‘yes’ or ‘no’- they may decide they want additional peer review” Exhibit E at 8, (“We try not to be too bureaucratic.”)

³⁶ “Junk Accounting” is analogous to “Junk Science”, and should be excluded from courtroom forensics. See generally Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and prodigious progeny, F.R.E. 702, Trial Transcript at 475 Line 12: “KWOK Your Honor, we offer her as an expert witness under Federal Rules of Evidence 703[F.R.E. 703]. Underlying documents that an expert rely upon does not have to be admissible. That’s what auditors do”, Sentencing 1 Transcript at 5 Line 1: (“It seems to me this is just a rough calculation and not

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(.1) The rent was reclassified as salary, it was never allowed.

The Rent was not allowed.⁴¹ It was never allowed.⁴² The rent was **reclassified** into salary⁴³. Negotiations were underway from the first days of the first year between CASI, Orthwein⁴⁴ and Snowden⁴⁵. The Petitioners perseverance in paying rent⁴⁶, was interpreted as evidence of criminal recalcitrance. Because the Prosecutions' own schedule GX114 includes rent checks (buried) in the salary line, then the Petitioners negotiation to include the rent in some fashion was successful. The ATP program had indeed accommodated⁴⁷ Karron.⁴⁸

something that a Court could rely on in a criminal case. [...] That's my assessment of that proof.") Sentencing 1 Transcript at 6 Line 3: ("COURT: "Show me. She has no tabulation putting 4 [GX] 114 into context with her [...] Exhibit [GX]110.")

³⁷ Because of Karron's lack of experience in grant accounting (Sentencing 1 Transcript at 88 Line 14, Sentencing 1 Transcript at 77ff Line 24, Sentencing 1 Transcript at 79 Line 11), spending was spread over a number of accounts (see Exhibit D, Dunlevy (lead sheets). Frank Spring billed back corporate and personal charges on Karron's personal accounts back to CASI and NIST. Because co-funding and co-mingled personal and overhead spending, accountants who have reviewed Karrons account also termed it as the Trial Court did: "a mess"(Sentencing 1 Transcript at 16 Line 15). Karron kept good records not available to the Defense Counsel because restoration from Computer Images took almost until the start of the trial, and Counsel did not have, and could not absorb the volume of material. CASI non program spending and Karron's non program spending were conflated into misappropriated grant spending with the erroneous assumption that all funds were federal funds.

³⁸ The American Institute of Certified Public Accountants (AICPA) Governmental Audit Quality Center (GAQC) promotes the importance of quality governmental audits and the value of such audits to purchasers of governmental audit services. GAQC is a voluntary membership center for CPA firms ... that perform governmental audits. This organization sets standards to eliminate junk auditing and accounting.

³⁹ U.S. Commodity Futures Trading Commission (CFTC) Press Release: PR6114-11 September 22, 2011 "CFTC Charges National Accounting Firm McGladrey & Pullen, LLP, and Partner David Shane with Failure to Properly Audit One World Capital Group, a Former Registered Futures Commission Merchant ... Firm to pay \$900,000 and institute remedial measures, and Shane to pay \$100,000 personally to settle CFTC action"

⁴⁰ Trial Transcript at 907 Line 1: (Spring – Cross Spring asked if was ever asked to change dates on items)

⁴¹ Based on the assumption that it is an indirect or overhead cost, and is allocable to multiple projects and applications. See GX1 Chapter 1, Sections C.4 and C.5 of the November 2000 ATP Proposal Preparation Kit ("5. What types of costs are unallowable?)

⁴² It was never allowed as 'rent' *per se*.

⁴³ Karron Brief at 33. "10. The Explanation for the Karron Salary Line is to include Rent Checks"

⁴⁴ Exhibit O: Kickoff Meeting at NIST Badge and notes showing meeting agenda. Agenda included rent.

⁴⁵ Trial Transcript at 423 Line 5: Snowden - Cross Q. How many calls did you make? A. Quite a few.

⁴⁶ Sentencing 1 Transcript at 79 Line 11: [KARRON] I didn't want to take money unless I absolutely needed it. It was like running a little business. The owner doesn't take the money unless you need it. I didn't want to take salary. I just wanted to take \$2,000 at a pop for rent. I thought I could charge it against salary.

⁴⁷ Trial Transcript at 127 Line 25: Lide - direct [KWOK]Q. What did you hope to accomplish going back the second time? A. What we hoped to accomplish was to have a discussion to try to iron out the budget differences, because that had become a major issue in this grant, was to get a budget that the awardee could live with, and yet met the government rules and regulations.

⁴⁸ Exhibit E Certified Audio Trans. April 13, 2007 ATP Proposers' Conferences NIST Red Auditorium, 100 Bureau Drive, Gaithersburg, MD 20899 A[nsver]: [MARC STANLEY, ATP PROGRAM DIRECTOR] One of the things I pride myself on in this program and with my colleagues is that: **We try not to be too bureaucratic. We are very supportive of the companies that win awards from us, ...**

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(.2) Why Brady Material⁴⁹ must exist

Some ‘undiscovered’ exculpatory discovery “material” is already in the corpus of the discovery papers⁵⁰, “needlelike” in the proverbial “haystack”^{51 52}. Direct testimony spells out undisclosed material.⁵³ Circumstantial clues point to much more.⁵⁴

(...1) Snowden admitted destroying and withholding correspondence

Snowden admitted in open court, on the record, during cross-examination by Defense Counsel, to destroying working papers⁵⁵, and admitting to “additional correspondence”⁵⁶ evidencing understandings not shared⁵⁷ with the Defense.⁵⁸ Snowden admitted keeping clearly exculpatory material⁵⁹ from the investigators and prosecutors. Evidence will show that is because she had been helping Karron and Hayes.⁶⁰ The Prosecution clearly faulted in not providing the Defense with an advanced copy of the Rule 3500⁶¹ tagged GX2000, and

⁴⁹ Brady v. Maryland, 373 U.S. 83, 87 (1963). See also Giglio v. United States, 405 U.S. 150 (1972)

⁵⁰ Not subject to the Procedural Default Doctrine because, particularly for Rubinstein, and not cognizable without extreme diligence, not due diligence. This resulted in Constitutional Ineffective Assistance of Counsel (see Karron Brief at Section “(4) viii. “Rubinstein was dangerously computer illiterate and tried to hide this until it was too late”, “also argued *below*. Further, Ineffective Assistance of Counsel claims are never subject to the Procedural Default Doctrine. See Massaro v. United States, 538 U.S. 500, 503-04, 123 S. Ct. 1690, 1693, 155 L.Ed.2d 714 (2003)

⁵¹ Cohen, J and Walsman, D. D. (2009)The ‘Brady Dump’: Problems With ‘Open File’ Discovery. New York Law Journal, Volume 242—No. 4, September 4, 2009. For Defense Counsel Rubinstein, 20,000 pages (Discovery, 100+ GXexhibits) was too much when a single text message was too much. See Karron Brief at 105, Section 12.

⁵² “Rubinstein dangerously computer and accounting illiterate”

⁵³ Gershman, Bennett L. (2007)CASE WESTERN RESERVE LAW REVIEW, Vol. 57:3, at 13- 47

⁵⁴ Trial Transcript *below*. Snowden – cross

⁵⁵ Specifically, 1) Snowdens’ admission *below*, 2) Riley’s GX114 audit issues *below* 3) Benedicts’ testimony pointing to utility wavers granted, *below* 4) the non-termination of the grant, *below* and Declaration of Goldberg regarding Ondriks’ false Declaration *below* and *etc*.

⁵⁶ Trial Transcript at 420 Line 19: Snowden – Cross, [...] I would just **discard the old form** and put in the correct form.

⁵⁷ Trial Transcript at 424 Line 3: Snowden - cross [RUBINSTEIN] Q. So you're telling us there are additional reports than what we have here as exhibits, within exhibit 40 through 43? A. I'm telling you that there are correspondence, additional correspondence to these exhibits

⁵⁸ Trial Transcript at 424 Line 4: Snowden – direct There's quite a few changes. I only gave you guys a couple. There are a lot of changes. I didn't think you wanted every last one of them.

⁵⁹ Trial Transcript at 424 Line 1: (Snowden – Cross [RUBINSTEIN] Q. You never turned it over to the Prosecutor? A. Yes.)

⁶⁰ Implicating she was working for or against CASI and covering her tracks.

⁶¹ Trial Transcript at 309 Line 4 et. seq. [SNOWDEN] “There's quite a few changes. I only gave you guys a couple. There are a lot of changes. I didn't think you wanted every last one of them” She was spoon feeding CASI instructions on how to fill in the forms.

⁶² Trial Transcript at 496 Line 16 (“[COURT] Now, we had some issues about whether the Government's Exhibit 2,000, and 2,001 were 3500 material that were not produced to the defendant. RUBINSTEIN: Yes, your Honor. [...] COURT: It came up in cross as a result of your cross-examination. RUBINSTEIN: Yes, because I had never been provided with those documents, so I was totally unaware.”)

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GX2001.⁶² The Defense clearly faulted in not pursuing the material referenced to by Snowden, revealed and admitted during Snowdens' testimony.

(...2) Power and Telephone were allocated and approved

Power and Telephone⁶³ **were allocated and approved** in audit work papers.⁶⁴ The prosecution and their trial testimony hammered away with the argument that it was **not allowed**. Effectively, a waiver had been granted. Where are the copies of the draft budgets for approval reflecting these approvals and waiver?

(...1) Waivers

A waiver is the voluntary relinquishment of a known right.⁶⁵ ⁶⁶ The granting of a waiver must be a deliberate. A valid waiver cannot be created through inadvertence: The agency providing the waiver must be fully informed.⁶⁷

⁶² Trial Transcript at 454 Line 1: Snowden – redirect (at the sidebar) RUBINSTEIN: I apologize, Judge, but I didn't think that the government was going to offer something that they never turned over, that's clearly 3500 material. KWOK: Well – RUBINSTEIN: And to introduce it is inappropriate. OK? And they violated Rule 3500, and your Honor should strike these documents from the record. COURT: I will take it under advisement and hear you after the end of the court day.

⁶³ Discovery Material Bates Stamped at 5274, 5348, 5347ff of 6636 and 3500 material in the tens of thousands of pages.

⁶⁴ Sentencing 1 Transcript at 17 Line 15: ("COURT: Utilities. EVERDELL: Utilities was second. COURT: There was some testimony on utilities. **He got an approval.** EVERDELL: Your Honor, I don't think there was ever testimony that he got a prior approval for utilities. In fact, he was told repeatedly that utilities were not allowed. COURT: The difference between the utilities for the apartment before and after the upgrade for air conditioning and for the machinery -- EVERDELL: I think the only testimony we had on the record is that he tried to get an approval for the utilities, but he never received one. COURT: Mr. Rubinstein's quotes a utilities figure using Mr. Benedict's testimony at 1057 [...] COURT: And the discussions were that if he could indicate the fact that there was an increase, that they could be classified as direct expenses, not indirect expenses. EVERDELL: It says the discussion were, right, that if he could demonstrate the fact that there was an increase, that they could be classified as direct expenses, not indirect expenses. But there was never any approval of this. So at this point none of the testimony here is talking about any approval of any additional utilities, expenses, or anything like that COURT: Sounds like approval, but not written approval. [...] COURT: This does say the witness summarizes his testimony at the end of the page. **The incremental amount of additional expense caused by the grant could be classified as direct expense and not indirect expense. Direct expenses are allowed, regardless of what they are.** Indirect expenses are not allowed. EVERDELL: I think that that quote just says right there that they are talking about a possibility, but a possibility that was never actually approved. [N.B. **The audit allowances are evidence of reality of this, not the possibility**] And a possibility that was never actually budgeted. So— COURT: It suggests not approved in writing. I have seen that I agree with that But it sounds as if it was approved orally. EVERDELL: I don't know if I read that as that [...] COURT: is that the criminal intent of the defendant is important here. And if he was proceeding on that basis, that seems to me – I have reason to -- it seems to me that that amount is an amount that should not be considered in the loss calculation. EVERDELL: Your Honor, I think I have to respectfully disagree with that ")

⁶⁵ <http://en.wikipedia.org/wiki/Waiver>

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(....2) Because utilities waivers were indeed granted, backup documentation must exist

The Governments auditors' work papers explicitly allocated power⁶⁸ ⁶⁹. The transcript reveals discussion but no witnesses explicitly admit to the allowance approval.⁷⁰ ⁷¹ Witnesses repeatedly testified that power was not allowed (in general)⁷² or never allowed (in this particular circumstance)⁷³. The auditor work paper⁷⁴ also revealed explicit allowances for telephone, cable and computer communication costs. The official and professional government auditor would not have made these allocation allowances "*on a whim*", contrary to ATP rule⁷⁵ and policy⁷⁶ ⁷⁷ ⁷⁸,

⁶⁶ Judicial and statutory definitions of words and phrases, Volume 4 By West Publishing Company

⁶⁷ EPSTEIN, R. A. (2011) Government by Waiver. National Affairs Issue #7, Spring 2011.

⁶⁸ The document allowing and allocating power was in the criminal Discovery Documents Bates stamped at 05274 and 05348. These proverbial "needles" were buried in the discovery Haystack and were never cited at trial. For discussion on the inapplicability of the Procedural Default Doctrine, see *below*.

⁶⁹ Sentencing 1 Transcript at 81 line 9 [KARRON] We did get the power approved. I did have long discussions with B.J. and Jane about how we can fix this, how we can change this, what needs to be done. I made regular visits to Washington. I tried to keep in touch with my program managers. They came and visited regularly. We were making good scientific progress. But my attitude was, the hell with the financing, as long as I kept records. I have all of the source records. And give it to the accountant and she will figure it out.

⁷⁰ Trial Transcript at 850 Line 11 [Frank Spring][Reading a letter from Karron] A. Right. This is from the defendant. You and she need to keep grinding away on disallowed items. Power, Jill Feldman, Solomon and Bernstein, Peter Berger, *et cetera, et cetera, et cetera*, are all actually and partly allowable. Rent, some cable, some telephone are not yet allowed. I may get an allowance on rental of the living room to the project, as it is clearly completely taken over by the project.

⁷¹ Trial Transcript at 1312 Line 2 [RUBINSTEIN] SUMMATION ...oh, by the way, rent and utilities are not permitted. They're indirect costs. You know from the testimony in this case that CASI was approved to take off, to deduct utilities, a portion of the utilities. Because you'll see the e-mails and you'll see that in the exhibits they were allowed to take off electric \$7600, right. Why? Because it's an indirect cost. Well, how did you get it? Because it's negotiable. They submitted the bills showing that the increase in electricity, due to the equipment, showed a rise to the extent that they felt the grant people felt that Dr. Karron was entitled to reimbursement for on his[sic].

⁷² Arraignment Transcript at 19 Line 14: COURT: Not rent but what about fixings up the office so that if that -- or bringing electricity or bringing in high powered computers into the office. KWOK: That's also disallowed and the reason is simply because there is an approved budget. Every item that Dr. Karron was allowed to use was listed in that budget and if you deviate from that budget you first have to seek pre approval to do that and at no point did Dr. Karron receive that

⁷³ Trial Transcript at 851 Line 1: Q. (Spring – direct "To your knowledge, did the defendant ever get an allowance for rent and utilities, things like that, from the people at ATP? A. No.")

⁷⁴ Bates Stamped Discovery at-5347ff : audit work papers showing Telephone, Cable and Computer costs allocated and allowed

⁷⁵ 15 C.F.R. §295.3 "No funding for indirect costs, profits, or management fees shall be available for awards made under this subpart.

⁷⁶ GX1, Chapter 1, Sections C.4 and C.5 of the November 2000 ATP Proposal Preparation Kit ("5. What types of costs are unallowable? Regardless of whether they are allowable under the Federal cost principles, the following are unallowable under ATP: (b.) Indirect costs for single company recipients are unallowable for reimbursement with Federal funds and must be absorbed by the company.") [Clearly, it was and GX1 is incorrect or waved].

⁷⁷ GX2: (General Terms and Conditions /ATP/08-01: Section 10. UNALLOWABLE PROJECT COSTS: "Those costs that are designated as being unallowable in Chapter 1, Sections C.4 and C.5 of the November 2000 ATP Proposal Preparation Kit will be unallowable under this award.")

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and direct order.⁷⁹ The waiver was granted under Government rules and policies for making exceptions.^{80 81 82 83} Changes are a way of life in high technology high risk research.⁸⁴ The ATP program could not be as rigid as the OIG would have the Court and Jury believe.⁸⁵

⁷⁸ Trial Transcript at 256 Line 16 ([EVERDELL] Q. And what was your response to the question, can rent and utilities be paid for with ATP funds? [SNOWDEN] A. No, they're unallowable costs.)

⁷⁹ Sentencing 1 Transcript at 21: ("[EVERDELL]: ... We are not talking to the people at NIST, who actually made the approval, such as Hope Snowden. If I recall correctly, Hope Snowden's testimony about utilities was simply that there were lots of conversations that she had with the defendant himself and with others about whether or not grant funds could be used for utilities, and she said no. COURT: Where is this? EVERDELL The cites to the record? COURT: Yes. EVERDELL Your Honor, I'm afraid I don't have. COURT: This does say the witness summarizes his testimony at the end of the page. The incremental amount of additional expense caused by the grant could be classified as direct expense and not indirect expense. Direct expenses are allowed, regardless of what they are. Indirect expenses are not allowed. EVERDELL: I think that that quote just says right there that they are talking about a possibility, but a possibility that was never actually approved. And a possibility 'that was never actually budgeted. So-- COURT: It suggests not approved in writing. I have seen that I agree with that **But it sounds as if it was approved orally.**")

⁸⁰ GX3 (OCTOBER 1998 DEPARTMENT OF COMMERCE, FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS, .03 Federal and Non-Federal Sharing (b) b. "The non-Federal share, whether in cash or in in-kind, is expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or **later commitment of cash or inkind contributions. However, the Recipient must meet its cost share commitment over the life of the award.**") [EMPHASIS ADDED]

⁸¹ DEPARTMENT OF COMMERCE GRANTS AND COOPERATIVE AGREEMENTS INTERIM MANUAL (02/2002) Chapter 19, at 9,(3) Federal and Non-Federal Sharing. (b) ("The non-Federal share, whether in cash or in-kind, will be expected to be paid out at the same general rate as the Federal share. Exceptions to this requirement may be granted by the Grants Officer based on sufficient documentation demonstrating previously determined plans for or later commitment of cash or in-kind contributions. In any case, recipients must meet the cost share commitment over the life of the award.")

⁸² DEPARTMENT OF COMMERCE GRANTS AND COOPERATIVE AGREEMENTS INTERIM MANUAL (2002-02) (4) (A).(b) ("The Grants Officer may approve exceptions on a case-by-case basis, regardless of the amount of Federal funding. The regulation stipulates that an exception made on a case-by-case basis will only apply to a single award. ")

⁸³ DEPARTMENT OF COMMERCE GRANTS AND COOPERATIVE AGREEMENTS INTERIM MANUAL (2002-02) (4)(F)(4) 4. "Approve, as appropriate, less restrictive requirements and exceptions pursuant to the delegation of authority from the CFO/ASA in accordance with Section A.2. of this chapter."

⁸⁴ Arraignment Transcript at 20 Line 2: ("[KWOK] [...] are only allowed to pay, for example, to hire scientists and research personnel and to buy a specified number of computers for your research. But to renovate your apartment or office to eat out which is another item that Dr. Karron spent money on or to even pay for Internet services they are specifically disallowed under the terms of the grant. And another big item is back rent, and that is also clear that you are not supposed to pay rent or mortgage under the grant. RUBINSTEIN: The government wants the grant to be written in granite. The fact of the matter is that these grants they have modifications all the time. People spend money, as long as they're spending it legitimately that's an issue at trial.")

⁸⁵ Exhibit E Certified Audio Trans. April 13, 2007 ATP Proposers' Conferences NIST Red Auditorium, 100 Bureau Drive, Gaithersburg, MD 20899 A[nsver]: [MARC STANLEY, ATP PROGRAM DIRECTOR] One of the things I pride myself on in this program and with my colleagues is that: **We try not to be too bureaucratic. We are very supportive of the companies that win awards from us, ...**

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(...3) GX114 reallocation supporting documentation must exist

The internal logic and structure of the GX114 number classifications, makes it is impossible to deny that the rent checks were reclassified from rent into the salary line and denominated⁸⁶ as Salary⁸⁷. Using only GX110 numbers⁸⁸, and Riley's fringe rate⁸⁹, there are just not enough checks into and out of Karron to make up the denominated salary⁹⁰ **without including the rent checks.**^{91 92} This hard finding **vitiates** the trial stampede of naysaying circumstantial witnesses^{93 94}.

⁸⁶ Sentencing 1 Transcript at 7 ("COURT: It's denominated salary.")

⁸⁷ 11-civ-1874 /07-cr - 541 (not docketed) Revised and Resubmitted Memorandum of Facts and Law to accompany 28 U.S.C. §2255 Motion to Vacate Criminal Verdict: Revised and Resubmitted Version of April 28, 2011, answered by the Government/Respondents 7(1)ii. "Analysis of GX114 Errors and their meaning"

⁸⁸ *Ibid.* Footnote 41

⁸⁹ Trial Transcript at 803 Line 19. RUBINSTEIN: Q. CASI spent \$200,488 on his salary. How did you get that number? RILEY: A. By including the withholdings portion of the fringe benefits as part of the salary of what he received. It includes the salary, it includes the difference between the loans he received and the loans he paid, and it includes the fringe benefits. [Riley does not answer this question truthfully, as the analysis of GX114 Karron Brief at 18, 33, 33 (Figure 1, "GX114 Karron Salary Component Breakdown ..." (bar chart)), 36 (Figure 2, "Karron GX114 Salary components showing proportion of rent relative to cash and fringes" (pie chart)), 36 (Table), and *et seq*]

⁹⁰ Sentencing 1 Transcript at 7 Line 17: ("COURT: It's denominated salary. It's a table [in GX114] saying salary.")

⁹¹ *Ibid.* Figure 1 GX114 Karron Salary Component Breakdown, Figure 2 Karron GX114 Salary components, Footnote 41 (perhaps this should have been a stand-alone table) "GX110 showing only relevant section of spreadsheet data detailing checks from and to Karron for year 1 alluded to in GX114 testimony" by Riley.

⁹² The Procedural Default Doctrine does not apply because a reasonable person of normal intelligence and expectations exercising due diligence would not have made this discovery.

⁹³ Trial Transcript at 842 Line 6: (Spring - direct A. "Well, he would point out to me that I either didn't know my job, I didn't understand what an ATP allowable expense was or wasn't, or that he was in conversation with the ATP managers in Washington to ensure that these expenses, which I understood to be not allowed by the project, would be allowed into the project as an expense. Q. Did you see anything in particular reflected in the books regarding these conversations you had with the defendant? A. Well, as the kind of person in charge of keeping the Quick Books file correct, I took it upon myself to take what was an allowable expense and put it into that category, and if it was not allowed into ATP, to put it into the general CASI expenses. Q. And what, if anything, would the defendant do after you did that? A. Normally I would go away [...] come back for my next session and find out that the expenses that I had taken out of ATP, turned them back into a CASI only expense, had been had been reinputted as an ATP allowable expense.")

⁹⁴ Trial Transcript at 395 Line 22: (Snowden -- cross [RUBINSTEIN] "Q. Now, in these discussions that you had with Dr. Karron about, rent and utilities aside, did you say anything else other than no, when he asked you about the grant money covering rent and utilities? A. I said no. Q. Did you discuss this with Miss Goldstein, the supervisor -- A. Yes. Q. -- the fact that Ms. Goldstein advised you that if CASI got commercial space and if they made a lease in the name of the grant ATP, DMT, that that would be an acceptable expense? A. No, it's not an acceptable expense. Q. No, no. Did you have that discussion with Ms. Goldstein? Did you -- did Ms. Goldstein tell you that? No.") [Editorial Comment: Goldstein did know, Goldstein Did not tell you that, yet she did allow it]

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(...4) Snowden admitted destroying and withholding correspondence

Snowden admitted to destroying working papers⁹⁵, and described “additional correspondence”⁹⁶ evidencing understandings not shared with the Defense.^{97 98 99} More problems with exculpatory material arose at trial.¹⁰⁰ The prosecution clearly faulted in not providing the Defense with an advanced copy of the Rule 3500¹⁰¹ tagged GX2000, and GX2001.¹⁰² Snowden was keeping exculpatory material¹⁰³ from the Prosecution. This is

⁹⁵ Trial Transcript at 420 Line 19: (Snowden – Cross, [...]) I would just **discard the old form** and put in the correct form.)

⁹⁶ Trial Transcript at 424 Line 3 (Snowden - cross at [RUBINSTEIN] “Q. So you're telling us there are additional reports than what we have here as exhibits, within exhibit 40 through 43? A. **I'm telling you that there are correspondence, additional correspondence to these exhibits**”)

⁹⁷ Trial Transcript at 424 Line 4: (Snowden – direct “There's quite a few changes. I only gave you guys a couple. There are a lot of changes. I didn't think you wanted every last one of them.”)

⁹⁸ Trial Transcript at 424 Line 1: (Snowden – Cross, [RUBINSTEIN] Q. “You never turned it over to the Prosecutor? A. Yes. “)

⁹⁹ Trial Transcript at 424 Line 12 (Snowden – Cross, [RUBINSTEIN] Q.” And, in fact, the letter provides that there are five budget revisions? A. It says there's quite a few budget revisions.”)

¹⁰⁰ Trial Transcript at 419 Line 13 (Snowden – Cross [RUBINSTEIN] Q. Okay. Nobody commented on that to CASI, correct, that there was, these reports, these financial status reports were inconsistent and inaccurate? A. Ye., there were comments on it. A. Yes, there were comments on it. Q. Where were comments made? A. Excuse me? Q. Where were comments made? A. Probably verbal. They were probably -- the -- what I usually do if there is a budget that comes in that's wrong, I'll just give the company a call and say, your numbers are wrong, please revise and resend your document. COURT: Did you make that call? THE WITNESS: Yes. [...] Yes, even -- one -- I think the numbers are -- the dates were wrong too. Yes, I'm sure I made the call. Q. Who did you speak to? A. Usually when I would call the doctor -- I probably -- usually I would speak to Lee Gurfein. Q. And did you memorialize that in any way with an e-mail that you had made that call? A. No. Q. Did you put anything in your government file to indicate that you had made the call because you noticed these numbers were wrong? A. The practice is that I would put this document in the file, make a note to it, and then when a new form came in, I would just **discard the old form** and put in the correct form. Q. Well, did a new form come in? A. This -- a new form, a new form came in. Q. How long after you claim you made this call? A. Well, this one is a revision. I'm not getting the question. Q. And you say you made a note, you wrote something down in a file about it? A. Yes. Q. How many calls did you make? A. Quite a few. Q. After you got the second financial statement, I'm sorry. After you got the third financial statement, and you had not received a revision of the second financial statement yet, correct? A. Yes. Q. How many calls did you make about that? A. I made calls until it was corrected, and that is reflected in the original grant file. Q. When was it corrected? A. I have no idea, because the forms are not in front of me. Q. Well, in fact, the first time you ever got a revised financial status report is reflected in the exhibits A to 40, 41, 42, 43, correct? A. No, that's not correct. Q. Aren't those the revision reports? A. These are, these are revised reports, but these are not the first revised reports. Q. Where is the first revised report? A. In the original grant file. Q. You never turned it over to the Prosecutor? A. Yes. Q. So you're telling us there are additional reports than what we have here as exhibits, within exhibit 40 through 43? A. I'm telling you that there are correspondence, additional correspondence to these exhibits.)”

¹⁰¹ Trial Transcript at 496 Line 16 (“[COURT] Now, we had some issues about whether the Government's Exhibit 2,000, and 2,001 were 3500 material that were not produced to the defendant. RUBINSTEIN: Yes, your Honor. [...] COURT: It came up in cross as a result of your cross-examination. RUBINSTEIN: Yes, because I had never been provided with those documents, so I was totally unaware.”)

¹⁰² Trial Transcript at 454 Line XX Snowden – redirect RUBINSTEIN: I apologize, Judge, but I didn't think that the government was going to offer something that they never turned over, that's clearly 3500 material. KWOK: Well – RUBINSTEIN: And to introduce it is inappropriate. OK? And they violated Rule 3500, and your Honor should

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because she had been helping Karron.¹⁰⁴ When the OIG Special Agents appeared on the scene, Snowden must have felt she might have implicated herself. Snowden's admission is justification enough for 2255 discovery and a new hearing. .

(...5) Riley must have created contemporaneous documents

Riley must¹⁰⁵ have created contemporaneous field notes, e-mails and work papers from her two visits to CASI. Her exculpatory work papers were found in the discovery material¹⁰⁶ but too late to support exculpatory testimony at trial¹⁰⁷. The testimony at trial was that these allowances were under discussion, negotiation, but were never binding.¹⁰⁸ The contemporaneous field notes and e-mails should have been discovered to support the work paper findings that negotiations went to fruition, but they were not. The OIG audit reports¹⁰⁹ only recite disallowances by amount, and the numbers cannot be traced back to the work papers, as they should have been.¹¹⁰ Riley's testimony was more than "weak"¹¹¹, as the Trial Judge at sentencing concluded that they were "...not something that a Court could rely on in a criminal

strike these documents from the record. COURT: I will take it under advisement and hear you after the end of the court day.

¹⁰³ Implicating she was working for or against CASI and covering her tracks.

¹⁰⁴ Trial Transcript at 309 Line 4 et. seq.. SNOWDEN: "There's quite a few changes. I only gave you guys a couple. There are a lot of changes. I didn't think you wanted every last one of them" [She was spoon feeding CASI instructions on how to fill in the forms].

¹⁰⁵ Government Auditing Standards July 2007 Revision GAO-07-731G 4.01 "This chapter establishes field work standards and provides guidance for financial audits conducted in accordance with generally accepted government auditing standards (GAGAS)."

¹⁰⁶ Criminal Trial Discovery Bates Stamped Pg. 5274, 5348, 5347ff of 6,636

¹⁰⁷ Sentencing 1 Transcript at 17 Line 15: COURT: There was some testimony on utilities. **He got an approval.** EVERDELL Your Honor, I don't think there was ever testimony that he got a prior approval for utilities.

¹⁰⁸ Trial Transcript at 1078 Line 17: Benedict – redirect THE WITNESS: I said they're not binding. If you get oral authorization, do something, until you get written authorization it's not binding.

¹⁰⁹ GX60, GX61, GX62, Hayes, Draft and Final Audit Reports

¹¹⁰ Government Auditing Standards July 2007 Revision GAO-07-731G 4.19 "[...] Under AICPA standards and GAGAS, auditors should prepare audit documentation that enables an experienced auditor, 52 having no previous connection to the audit, to understand a. the nature, timing, and extent of auditing [...]; b. the results of the audit procedures performed and the audit evidence obtained; c. the conclusions reached on significant matters; and d. that the accounting records agree or reconcile with the audited financial statements or other audited information....". By Riley's direct admission at trial (this was not done. Trial Transcript at 473ff (also see above): Riley – direct and also at this sidebar...) RUBINSTEIN ... It's hard to believe that someone could be an auditor and not reconcile bank accounts that probably had less than 500 checks in total, for the period that we're talking about."

¹¹¹ Rule 33 Opinion and Order at 11. Footnote "Although the auditor assigned [to do] audits of CASI, Belinda Riley, was a weak witness (she had never testified previously), her spread sheets (GX110, GX111) showing each item of expense and reimbursement were backed up by the bank records of CASI and of the Defendant (GX-80, 81), which show clear evidence of the payment of \$18,000.00 to Dr. Karron for rent reimbursements in October 2001. (See Gov't. Mem., Ex. E.)" [Missed here is that the Rent Checks, while shown in GX110, appeared twice in GX114, once as Salary, and again as Rent. Judge Patterson would later downgrade his opinion of Riley at Sentencing.]

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case.”¹¹². Yet they were the foundation of the Petitioners conviction¹¹³ and Respondents’ Case in Chief.¹¹⁴

Riley’s’ first visit to CASI in June 2003 resulted in the grant suspension. Frank Spring, the bookkeeper, never completed a set of books for her to audit.¹¹⁵ Riley copied Hayes hostile audit.¹¹⁶ Riley never did an independent audit.¹¹⁷ From forensic analysis of Riley’s work papers revealed Hayes fingerprint of unique random errors, large and small. Riley’s’ record was as a punctilious award-winning auditor¹¹⁸, Riley displayed honesty in admitting on the stand that she did not reconcile the audit accounts and by inference, the audit.¹¹⁹ Something was obstructing her ability to conduct an audit.¹²⁰

(...6) Lee Goldberg Affidavit to OIG withheld in Ondrik Declaration

The Ondrik Declaration¹²¹ entirely omits at least one, and probably other citations to (an) exculpatory affidavit(s).¹²² Petitioner Exhibit G, Declaration of Lee H Goldberg, contains a copy

¹¹² Sentencing 1 Transcript at 5 Line 4

¹¹³ Trial Transcript at 1379 Line 24

¹¹⁴ R. Brief at 1

¹¹⁵ Trial Transcript at 473 Line XX: Riley – cross A. I used the records that [...] Joan Hayes had provided to come up with the numbers for this. I did not take Joan Hayes’ report and copy the numbers [...]Q.[...] do you have, either from your own work, general ledger [?] A. I think there are some ledgers there. [...] Q. Did you do a bank reconciliation of the various bank accounts of CASI? [...]A. No. [This assertion by Riley is incorrect (See Dunlevy Declaration below) because Riley’s audit report propagated Hayes payroll errors. Riley did not catch any Hayes payroll errors.]

¹¹⁶ Dunlevy Declaration at 5 of 12, and see Section “Questions About Audit and Quality of Audit” Summary schedule of payroll errors on CAC-426. Hayes Errors were copied into Riley’s Work papers and into GX62 final audit report. Riley did not do an Independent Audit. She copied Hayes hostile audit.

¹¹⁷ GOVERNMENT AUDITING STANDARDS Answers to Independence Standard Questions (July 2002) GAO Publication GAO-02-870G

¹¹⁸ Riley Expert Witness Resume, at 5: AWARDS (Number 4 of 4 total) 2005 DOC Silver Medal Award for Meritorious Federal Service "For conducting a complex and unique **joint** audit investigation of costs claimed against a scientific research cooperative agreement awarded by NSIT.[sic]". [emphasis added]: Further, the deference of credit for this project to a ‘joint’ collaborator begs the question if this was Hayes.

¹¹⁹ Issuing an audit report, without reconciling all affected accounts is a breach of AICPA professional ethics. AICPA Professional Standards As of June 1, 2008 Code of Professional Conduct and Bylaws. See also D. Satava , C. Caldwell and L. Richard(2006): Ethics and the Auditing Culture: Rethinking the Foundation of Accounting and Auditing Journal of Business Ethics, Volume 64, Number 3 / March, 2006 At 271-284. "... auditors involved have followed rule-based ethical perspectives ...—resulting in ... unethical conduct. ... [We make] suggestions that the ... profession should consider to restore public trust and to improve the ethical conduct of accountants and auditor"

¹²⁰ Government Auditing Standards July 2007 Revision GAO-07-731G “7.05 Audit risk is the possibility that the auditors’ findings, conclusions, recommendations, or assurance may be improper or incomplete, as a result of factors such as evidence that is not sufficient and/or appropriate, an inadequate audit process...”

¹²¹ R. Br. Exhibit 1.

¹²² R. Br. at 23 referencing Ondrik Decl. Paragraph 4: “None of the witnesses that were interviewed [...] provided any exculpatory evidence.”

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of Goldberg's' contemporaneous exculpatory affidavit. The Ondrik omits her interview of Goldberg and his affidavit. Goldberg makes sworn statements that the OIG interrogators asked the about Karrons' gender change, asked lascivious questions about Goldberg's relationship with Karron, and asked coercive and leading questions about Goldberg's financing of CASI. Therefore, Ondrik and the Government are incorrect in asserting that they have not withheld any Brady Material; this is but one specific counter example.

(...7) Budget revision change base rule conflicted: 10% of what?

ATP budgets¹²³ were not cast¹²⁴ in stone, and could not be cast in stone. Awardees could make use of their 10% variation 'change budget'¹²⁵ during the course of the budget year as circumstanced changed. In order to preserve change margins¹²⁶ for next year, awardees' were asked to prepare a new budget approved sometime after at the end of each fiscal year and before audit.¹²⁷ ¹²⁸ Awardees did not have the option NOT to change their budgets¹²⁹. It was mandatory.

¹²³ 15 C.F.R. (1-1-01 Edition) §14.25 Revision of budget and program plans. (a) The budget plan is the financial expression of the project or program as approved during the award process. [...] (b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, **in accordance with this section**. (c) For nonconstruction awards, recipients shall request prior approvals from the Grants Officer for one or more of the following program or budget related reasons. Approvals will be provided in writing by the Grants Officer

¹²⁴ GX1 at 64 ATP Proposal Kit Exhibit 14, Budget Worksheet Narrative Form: Paragraph 4 (We recognize that unexpected events occur frequently in R&D projects, and that budgets **may need** to be changed as a project proceeds. Don't fear that by providing a multi-year budget beyond the first year, you will be locked into those details. ATP allows a certain amount of flexibility in moving funds from one line item to another as circumstances change. By stating an amount for a given task, you will not be required to spend precisely that amount on that task. For example, if, in the second or third year of your project, you find that you need to spend more on one task and less on another than anticipated, that can be accommodated.)

¹²⁵ 15 C.F.R. (1-1-01 Edition) §24.30 Changes. (a) General. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project..

¹²⁶ And to stay within budget flexibility limitations.

¹²⁷ GX1 at 64 ATP Proposal Kit Exhibit 14, Budget Worksheet Narrative Form: Paragraph 4: (Recognizing that change is inevitable, we **may** ask our recipients for a revised budget at the beginning of each year of a multi-year project. However, the total amount provided by ATP for the project cannot be increased.) [A Zero-Sum Game]

¹²⁸ March 31, 2010 Missing Audit Reports from '1ST ATP Grant Recipients Final Report ATL - 19891 ("Lack of Authority")

¹²⁹ Trial Transcript at 456 Line XX: Snowden Redirect [RUBINSTEIN] Q. You were also asked some questions about revising budgets. A. Yes. Q. There are a few there I want to touch on. First, you said that I believe you **can** revise your budget at the end of the first year, is that right? A. Yes. Q. But if your year one has already ended, can you revise your year one numbers at that point? A. No. Q. So, what can you revise at the end of the first year of your budget? A. If your year one has ended, you can revise your out years, which would be years two and three.

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However, NIST ATP program specific budgets change practices were not part of the ATP statute¹³⁰ and ATP rule¹³¹. The authority of these practices is unclear¹³². They were made part of ATP cooperative agreements by reference¹³³. As of 2001, ATP practices appear to have conflicted with superior “general” Department of Commerce and National Institute of Science and Technology CFR statutes concerning the change base upon which to apply the 10% variation allowance.

ATP believed its change base was 10% of the last approved total annual budget¹³⁴ as Lide¹³⁵ and Snowden testified¹³⁶, and both the Defense and Prosecution believed. In this case GX2¹³⁷ specifies a change of plus and minus \$83,650¹³⁸ without approval. Snowden testified that “Program Specific” rules overrode regulations that are more general.¹³⁹

¹³⁰ 15 U.S.C. §278n (2001) (<http://www.gpo.gov/fdsys/pkg/USCODE-2001-title15/pdf/USCODE-2001-title15-chap7-sec278n.pdf>)

¹³¹ 15 C.F.R. §295 (2001) (<http://www.gpo.gov/fdsys/pkg/C.F.R.-2001-title15-vol1/pdf/C.F.R.-2001-title15-vol1-sec295-1.pdf>)

¹³² Trial Transcript at 61 Line 1: (Lide – Direct A. “I helped prepare them, I used them, and they were given to me as project manager.”)

¹³³ GX12: “This Award approved by the Grants Officer is issued in triplicate and constitutes an obligation of Federal funding. By signing the three documents, the Recipient agrees to comply with the Award provisions checked below and attached.” Checked first is “Department of Commerce Financial Assistance Standard Terms and Conditions”. This is apparently GX3. Penultimate checked is “General Terms and Conditions. Advanced Technology Program (ATP)(8/01), This is apparently GX2. This document is missing from the Government Exhibits: “Program Specific Audit Guidelines for ATP Cooperative Agreements with Single Companies (9/99)”.

¹³⁴ GX4, Slide 12, Recipient Responsibilities, Prior Approvals, Notify Grants Specialist: Budget Line Item Change >10% of total annual approved for each Recipient in each project year.

¹³⁵ Trial Transcript at 60 Line 10 Lide - Direct, Trial Transcript at 87 Line 1, Trial Transcript at XXX Line 94, Trial Transcript at 191 Line 1,

¹³⁶ Trial Transcript at 456 Line 14: (Snowden - redirect [RUBINSTEIN] Q. And you were also asked I believe about revising budgets, specifically the ten percent rule which is on that slide. Is that right? A. Yes. Q. And you testified about what that 10 percent rule means, right? A. Yes. Q. And is that 10 percent of the total award amount or 10 percent of the annual budget that you're allowing? A. It's 10 percent of the annual budget. Q. So, if you are allowed \$800,000 in the first year of your grant, how much can you move around in the first year of your grant without getting prior approval? A. \$79,999.99, under \$80,000.)

¹³⁷ GX2: (9. PRIOR APPROVAL REQUIREMENTS: The prior approval requirements in 15 C.F.R. 14.25, paragraph (e) MAY NOT be waived automatically by the Recipient and require written approval from the Grants Officer. In addition to the requirements specified in 15 C.F.R. 14.25, Recipients shall obtain prior written approval from the NIST Grants Officer for the following changes: a. The transfer of funds among direct cost categories must be approved in advance by the Grants Officer if the transfer exceeds 10% of the approved total annual budget) [original emphasis]

¹³⁸ GX23: TOTAL ESTIMATED COST and OBJECT CLASS CATEGORY H. Total Direct Cost. (Line. A thru G) of \$836,500.

¹³⁹ Trial Transcript at 298 Line 17 (Snowden – direct [KWOK] Q. “We talked a bit also about the regulations governing the ATP grants yesterday. A. Yes. Q.... Are there government-wide regulations that apply to the ATP grants that are not ATP grant specific? A. Yes. Q. And do these regulations apply to more than one government grant? 1 A. Yes. Q. Are there rules specific to the ATP grant that just cover the ATP grant? A. Yes, there is. Q. And

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However, governing rules 15CFR§24.30¹⁴⁰, 15CFR§14.25(f)¹⁴¹, and GX3¹⁴², calls out¹⁴³ a percentage base on the entire currently effective and approved budget. In this instance that is plus and minus \$211,450, for a total swing of \$422,900. Further, 15CFR§14.25(e)(4)¹⁴⁴ claims it is the superior statute and specifies it may not be overridden without approval from the OMB. No evidence of OMB approval for ATP Program Specific Rules has been offered or found. GX2 claims it is superior authority and may not be overridden without approval from the Grants Officer.

(.3) The Government's Case has feet of Clay.

The Governments' foundational¹⁴⁵ exhibits¹⁴⁶ and testimony¹⁴⁷ cited in the very first paragraphs of the respondents' brief, when viewed in this light of the Petitioners evidence presented here, are faulty.

which rules control if there is an ATP-specific rule versus a government-wide rule? A. Your ATP special work conditions and your general terms and conditions, they are specified within the award, so ... Q. So, if there is an ATP rule that applies to the ATP grant and a government-wide rule -- A. Your ATP rules supersede all other rules, because they're program-specific rules, so you have your ATP rules and then other rules, but ATP supersedes everything.")

¹⁴⁰ 15 C.F.R. (1-1-01 Edition) §24.30 Changes. (c) Budget changes—(1) (ii) Nonconstruction projects. Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which **exceed or are expected to exceed ten percent of the current total approved budget**

¹⁴¹ 15 C.F.R. (1-1-01 Edition) §14.25 (f) The recipient may not transfer funds among direct cost categories or programs, functions and activities for construction or nonconstruction awards in which the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Grants Officer. This does not prohibit the recipient from requesting Grants Officer approval for revisions to the budget [...]

¹⁴² GX3 OCTOBER 1998 DEPARTMENT OF COMMERCE, FINANCIAL ASSISTANCE STANDARD TERMS AND CONDITIONS, ..04 b. Unless the Recipient is subject to 15 C.F.R. Part 24 [...] cumulative transfers of funds of an amount above 10 percent of the total award must be approved by the Grants Officer in writing. This allows the Recipient to transfer funds among approved direct cost categories when the cumulative amount of such transfers does not exceed 10 percent of the current (last approved) total budget.

¹⁴³ Trial Transcript at 86 Line 10 (GX3 introduced into evidence). This discrepancy in percentage base was not noticed. The Lide and Snowden and the Prosecution Team continued to assume that Exhibit 3 referred to a project budget year base amount instead of it actually referred to a project budget lifetime change base.

¹⁴⁴ 15 C.F.R. (1-1-01 Edition) §14.25 (d) ("For nonconstruction awards, **no other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.**") [emphasis added]

¹⁴⁵ R. Br. at iv: Paragraphs 1 and 2 entitled "A. The Government's Case".

¹⁴⁶ R. Br. at iv: (GX10, The Gate 1 award winning proposal and obsolete budget, GX11: The award letter) ("received more than \$10,000 in federal funds during a one-year period" Apparently referring to Jury Charge Element Two (Case 1:07-cr-00541-RPP Document 56-7 Filed 07/21/2008 at 19 of 33) of 18 U.S.C. 666(b)), and "defendant was ...[an] Officer.". (*ibid* Jury Charge Element 1 at 18). (GX114: This exhibit does not add up. It appears to be partially made up. It gives Rent checks included in Salary and again as Rent. It cannot be compared or reconciled back to anything. "Look at that ... A mess"; Judge Patterson, Sentencing 1 Transcript at 16 Line 15; "I don't know who compiled them, but I gather it was Ms. Riley, but we never went into the detail ... " Sentencing 1 Tr at 4 Line 6. This includes by assumption GX110 (CASI Transactions sorted by Payee but otherwise unclassified

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(...8) Collapse of *mens rea* with government knowledge defense and program cooperation

The showing (*above*) of Governments' knowledge and cooperation with Karron in finding ways to cover utility costs and re-interpret and re-classify rent raises questions about the guilty mind of the Petitioner. If, as shown, Snowden and CASI/Karron were negotiating waivers and reclassifications, then draft budgets and ancillary correspondence must have existed. These should be recovered as Brady Material. It appears that ATP Program Specific Rules override were not authorized by the OMB. The inference of the Petitioners guilt, the 'knowing' *mens rea* state of the Petitioner; to 'knowingly' mispend when advised not to; when ordered not to; and when threatened not to, **collapses** when the petitioner had certain knowledge that the ATP program management was going to, and indeed found, a way to accommodate the Petitioners requests. Because the Petitioner had certain knowledge that the requests were actually accommodated, the government's criminal case topples.¹⁴⁸

Spreadsheet), All of the ATP Estimated Multiyear Budget Single Comp. OBJECT CLASS CATAGORIES, namely GX14-GX36, GX40-GX43A, GX47, *et seq*(GX115 is the CASI second year spreadsheet. As the jury only considered a one year period, the second year financials are moot except to counter balance payables from the first year. See Exhibit D [Dunlevy], GX61 Appendix III (Spitz)).

¹⁴⁷ Trial Transcript at 122f, 259, Spring (bookkeeper), Gurfein (manager) Benedict(manager), (no accountant) (Trial Transcript 637-38, 840-42, 978-79). The Government attempts to argue that disobedience of non professional staff resulted in the" defendant's willful misapplication of the federal grant, which totaled over \$1.3 million from October 2001 until it was shut down in June 2003[The project was not shut down, it is formally still suspended, the funds are still appropriated (Exhibit Browning) and Karron is not federally debarred(Excluded Parties List System)], the Government suffered a loss of at least \$120,000. (Sentencing 1 Transcript at 57f".

¹⁴⁸ R. Br. at iv: (GX10, The Gate 1 award winning proposal and obsolete budget, GX11: The award letter) ("received more than \$10,000 in federal funds during a one-year period" Apparently referring to Jury Charge Element Two (Case 1:07-cr-00541-RPP Document 56-7 Filed 07/21/2008 at 19 of 33) of 18 U.S.C. 666(b)), and "defendant was ...[an] Officer. (*ibid* Jury Charge Element 1 at 18). (GX114: This exhibit does not add up. It appears to be partially made up to suit. It gives Rent included in Salary and again as Rent. It cannot be compared or reconciled back to anything. "Look at that ... A mess"; Judge Patterson, Sentencing 1 Transcript at 16 Line 15; "I don't know who compiled them, but I gather it was Ms. Riley, but we never went into the detail ... " Sentencing 1 Transcript at 4 Line 6. This includes by assumption GX110 (CASI Transactions arranged by Payee but otherwise unclassified Spreadsheet), All of the ATP Estimated Multiyear Budget Single Comp. OBJECT CLASS CATAGORIES, namely GX14-GX36, GX40-GX43A, GX47, *et seq*(GX115 is the CASI second year spreadsheet. As the jury only considered a one year period, the second year financials are moot except to counter balance payables from the first year. See Exhibit D [Dunlevy], Exhibit GX62 APPENDIX III)

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(...9) GX114 was partially made up.

Specifically, GX114, the lynchpin of the Petitioners' conviction is innumerate¹⁴⁹ and appears to be partially made up to suit the Prosecution. The Jury relied on this piece of evidence.¹⁵⁰ The Jury was charged to weigh circumstantial and direct evidence equally.¹⁵¹ The Jury were never given any opposing exhibit to GX114, and or GX114 should not have been admitted into evidence. The defense counsel did not challenge GX114 math errors with any opposing forensic direct evidence. Counsel failed to discover any significantly new exculpatory material evidence, instead recycled Prosecutions exhibits.¹⁵²

(3) Rebuttal to Respondent Arguments

(.1) [Respondent Argument I]. Ineffective Assistance of Counsel

The Petitioner seeks Federal *Habeas Corpus* 2255 relief because the violation of her Constitutional right to effective counsel at her criminal trial. While Rubinstein had an impressive record where he provided effective assistance of counsel in "Blue Collar" criminal cases, he was out of his league in this particular "White Collar" "Paper Intensive" case. Making and rebutting these arguments is very difficult personally for both Petitioner and former lawyer.¹⁵³

Nevertheless, the net result of Rubinstein's representation of the former Defendant (now Petitioner) is that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"^{154 155} to find true fact

¹⁴⁹The numerical inconsistencies in GX114 are of a crude nature that would not be made by a person experienced in accounting and numerate reporting.

¹⁵⁰ Trial Transcript at 1379 Line 24 (Jury callback during deliberation)

¹⁵¹ Jury Charge Case 1:07-cr-00541-RPP Document 56-7 Filed 07/21/2008 at 7

¹⁵² R. Br. at 10, ("B. The Defense Case".)

¹⁵³ R. Br at 16, citing Karron Brief at 65

¹⁵⁴ Strickland v. Washington, 466 U.S. 668, (1984)

¹⁵⁵ Mosteller, Robert P., Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness (December 14, 2009). North Carolina Journal of International Law & Commercial Regulation, Vol. 36, No. 2, 2011; UNC Legal Studies Research Paper No. 1523431. Available at SSRN: <http://ssrn.com/abstract=1523431>

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and render a trustworthy verdict. This resulted in a trial verdict that the one cannot have confidence in and the Petitioner has suffered a miscarriage of justice.¹⁵⁶

Essentially, for any of a number of valid reasons, excuses or inexcusable faults, Defense counsel Rubinstein was unable (due to incompetence in critical areas¹⁵⁷) or unwilling (due to the conflicted nature of the attorney-client relationship in this case¹⁵⁸) to effectively fulfill his constitutionally mandated duty¹⁵⁹.

(...1) The VIth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹⁶⁰

(...2) Failure to Investigate and Prepare

Defense Counsel has a constitutional duty to make reasonable investigations.^{161 162} Counsel made none. The forensic recovery of the Defendants' computer data seized by the government¹⁶³ did not constitute discovery.¹⁶⁴ "The Sixth Amendment requires investigation and preparation". "A failure to investigate and file appropriate motions is ineffectiveness."¹⁶⁵ The Supreme Court has made clear the American Bar Association's Criminal Justice Section Standards of Practice of Criminal Law¹⁶⁶ can be used in determining the professional norms of defense preparation for purposes of *Strickland* analysis. In *Summerlin*, the Ninth Circuit pointed

¹⁵⁶ United States v. Bokun, 73 F.3d 8, 12 2d Cir. (1995).

¹⁵⁷ Karron Brief at 68, Footnote 204; Karron Brief at 105

¹⁵⁸ Karron Brief at 84

¹⁵⁹ American Bar Association Model Rules of Professional Conduct

¹⁶⁰ Sixth Amendment to the United States Constitution

¹⁶¹ Strickland v. Washington, 466 U.S. 688, 691, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

¹⁶² *Ibid* or to make reasonable decisions that make particular investigation unnecessary.

¹⁶³ 2007-08-08 Pre-Trial Conference, Page 2 MR. RUBINSTEIN: ... They have all of these documents which are the property of Dr. Karron. They say in their letter that they haven't accessed the CD's [sic] that were in these computers. This is all we are looking for. We are looking for the records that really are his records that he is entitled to under any scenario.

¹⁶⁴ 2007-08-08 Pre-Trial Conference, Page 17 Line 9 COURT: I want there to be some action here in terms of the parties not only having the discovery but also having access to whatever documents they think may bear directly on their defense.

¹⁶⁵ Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986)

¹⁶⁶ ABA Standards for Criminal Justice: Providing Defense Services, 3d ed., © 1992 American Bar Association

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out that ABA Standard for Criminal Justice 4-4.1,¹⁶⁷ which states in part that counsel has a duty "to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."¹⁶⁸

Counsel did not engage the forensic accountant Spitz¹⁶⁹ who was standing at the ready, or when the Petitioner was without funds, apply to the court for CJA funding¹⁷⁰. A key feature of the missed discovery was forensic accounting to verify Government numbers and produce rebutting schedules. When Counsel attempts to get Dunlevy, also standing by¹⁷¹, on the stand at the 11th hour, the Judge denies the request; as "late notice".¹⁷² From this, it is clear Counsel had no clear professional strategy, weak, strong, or consistent. He was flying by the 'seat of his pants' and he crashed the Petitioners constitutional rights.

(...3) Failure to Suppress

Counsel failed to file a motion to suppress GX114.¹⁷³ The prejudice that GX114 caused is clear and patently damning: The Prosecution continued to harp on GX114 all through the trial¹⁷⁴ and it penetrated into the Jury deliberations as a Jury Callback exhibit¹⁷⁵. It was not until Sentencing that the Trial Judge *sui sponte* observed GX114 was unsupported by GX110 in particular or arithmetic in general. The numbers did not make sense.¹⁷⁶ In a similar case, not a

¹⁶⁷ ABA Standards for Criminal Justice: Standard 11-4.3 Obligation to obtain discoverable material (current renumbered standard as of September 11, 2011)

¹⁶⁸ Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005)

¹⁶⁹ See Exhibit G, Declaration of Goldberg, Page 9.

¹⁷⁰ ABA Standards for Criminal Justice Standard 11-6.3 Investigations not to be impeded

¹⁷¹ Trial Transcript at 1168 Line 1: [KWOK] We've never known that this witness [DUNLEVY] existed. She has been in the courtroom the whole time hearing all the testimony and we have not heard a word that she would be testifying. ...

¹⁷² Trial Transcript at 1172 Line 19 COURT: I'm not going to allow her testimony as an expert, late notice.

¹⁷³ Trial Transcript at 550 Line 25: GX114 Accepted into Evidence

¹⁷⁴ Trial Transcript at 762 Line 17; Trial Transcript at 764 Line 22; Trial Transcript at 795 Line 25; Trial Transcript at 796 Line 2; Trial Transcript at 803 Line 6, 14; Trial Transcript at 804, Trial Transcript at Line 17, Line 25; Trial Transcript at 805, Line 8, Line 12; Trial Transcript at 814 Line 15, Line 22; Trial Transcript at 820 Line 506; Trial Transcript at 822 Line 6-7, 18-19; Trial Transcript at 828 Line 15-21; Trial Transcript at 829 Line 2-20; Trial Transcript at 830 Line 5; Trial Transcript at 1266 Line 16; Trial Transcript at 1269 Line 10; Trial Transcript at 1270 Line 6

¹⁷⁵ Trial Transcript at 1370 Line 24, Jury Callback Exhibit List.

¹⁷⁶ Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). at 595; United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve.").

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single person, including the several lawyers and the trial judge, noticed key numbers in the states' forensic analysis were grossly in error.¹⁷⁷ There was a reasonable probability given it was the Trial Judges' own astute observation that Counsel would have prevailed on a suppression motion. With the collapse of *mens rea* argument made above, GX114 suppressed, and a rebutting forensic exhibit in its place, the outcome in this case would have been affected.¹⁷⁸

(...4) Failure to confront hostile auditor Hayes as witness

Hayes is the root hostile witness against Karron, not Riley. Riley copied the Hayes Audit as her own¹⁷⁹. Riley won a Department of Commerce *Silver Medal* for this¹⁸⁰. Dunlevys' Declaration confirms Hayes payroll errors in the OIG figures.¹⁸¹ Hayes was the true author of the OIG audit numbers¹⁸² and fringe allocation of GX114 Salary lines.¹⁸³

(....3) The Confrontation Clause

The Confrontation Clause of the Constitution of the United States provides that: "[I]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."¹⁸⁴ That right is to have a face-to-face confrontation with witnesses who are offering testimonial evidence against the accused in the form of cross-examination during a trial.

¹⁷⁷ Thompson v. Com., 177 S.W.3d 782 (KY, 2005)

¹⁷⁸ Kimmelman v. Morrison, 477 U.S. 365, 385–87, 106 S. Ct. 2574, 2588–90, 91 L. Ed. 2d 305, 326–27 (1986) (finding ineffective assistance when counsel failed to move to suppress evidence because of counsel's failure to investigate); People v. Wallace 187 A.D.2d 998, 998–99, 591 N.Y.S.2d 129, 130 (4th Dept. 1992) (finding attorney's failure to object to admission of evidence was ineffective assistance);

¹⁷⁹ Trial Transcript at 473 Line XX: Riley – cross A. I used the records that [...] Joan Hayes had provided to come up with the numbers for this. I did not take Joan Hayes' report and copy the numbers [...] Q. [...] do you have, either from your own work, general ledger [?] A. I think there are some ledgers there. [...] Q. Did you do a bank reconciliation of the various bank accounts of CASI? [...] A. No. This assertion by Riley is factually incorrect(See Dunlevy Declaration below) because Riley's audit report propagated Hayes payroll errors. Riley did not catch any Hayes payroll errors. Riley, as an IRS Auditor, should have verified the payroll first but because she missed all of the myriad errors, she did not.

¹⁸⁰ Expert Witness Notification Letter May 16, 2008 From Kwok and Everdell to Rubinstein Re: FRCrP 16 (a) (1) (G) and FRE 702, Hazel Belinda Riley Resume Page 5: DOC Silver Medal Award for Meritorious Federal Service "For conducting a complex and unique joint audit investigation of costs claimed against a scientific research cooperative agreement awarded by NSIT[sic]."

¹⁸¹ Exhibit D and Case 1:08-cv-10223-NRB Document 32 Filed 08/23/10 Dunlevy Declaration Pg. 5 of 12, and see Section "Questions About Audit and Quality of Audit" Summary schedule of payroll errors on CAC-426. Hayes Errors were copied into Riley's Work papers and into GX62 final audit report. Riley did not do an Independent Audit. She copied Hayes hostile audit.

¹⁸² GX60, GX61 and GX62

¹⁸³ The part that is not made up.

¹⁸⁴ Sixth Amendment to the United States Constitution

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The Supreme Court in *Davis v. Washington* defined "testimonial" refers to any statement that an objectively reasonable person in the declarant's situation would believe likely to be used in court.¹⁸⁵ The Supreme court in *Melendez-Diaz v. Massachusetts* held that it was a violation of the Sixth Amendment right of confrontation for a prosecutor to submit a chemical drug test report without the testimony of the person who performed the test. The court ruled that the then-common practice of submitting these reports without testimony was unconstitutional.¹⁸⁶

(....4) Because Riley copied Hayes audit report the cross examination of Riley was not confrontation of the true witness against the Petitioner.

In this case Riley only transmitted the Hayes audit report, she was not the actual accuser. Submission of these audit report without testimony is unconstitutional. Rubinstein's cross-examination of Riley revealed she was re-submitting Hayes report under another name.^{187 188 189}
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¹⁸⁵ *Davis v. Washington*, 547 U.S. 813 (2006)

¹⁸⁶ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)

¹⁸⁷ See Above ("Did you reconcile these accounts? A. No.", ... I did not [...] copy Hayes Numbers") <<CITATION>>

¹⁸⁸¹⁸⁸ Trial Transcript at 468 Line 25 ("Q. And what did you do with the materials that Joan Hayes provided you? A. I used, I used them as a source of my audit.")

¹⁸⁹ Trial Transcript at 471 Line 15 ("Q. Is it correct, ma'am, that you used Joan Hayes' work papers to do your -- this report? A. I used the work -- the general ledgers, the cash disbursement registers, the -- whatever information, the books that were prepared by -- some things that Joan Hayes provided. The books that were being repurchased by Frank Spring. He also -- I also talked to him while I was there, to do - to come up with the work papers from this report. Q. Did you create any work papers, ma'am? A. Yes, I did. Q. Did you create a general ledger? A. For this report? Q. Yes. A. No. I mean no. Q. You used Joan Hayes' -- A. I didn't use Joan Hayes' audit for this as a, my - the final number for this report. Q. You testified that you used Joan Hayes' information, correct? A. I used Joan Hayes' -- I used it, the information that Joan Hayes -- that CASI under Karron had asked Joan Hayes to provide to me for this audit.

Q. Did you independently check whatever documentation Joan Hayes provided for you, to you? A. I did select a sample of the invoices to trace the sample of the ledger entries to trace to the invoices for this report. Q. Isn't it a fact that Joan Hayes had no general ledger? There was no general ledger for CASI; is that a fact? A. There were -- CASI used Quick Books, and so whatever the system of quick books there were -- there were -- there were things for Quick Books. Frank Spring, I guess Frank Spring

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(....5) Rubinstein Error

Rubinstein made an error of constitutional proportions that petitioner now seeks relief from. Rubinstein should have not let the Prosecution drop Hayes as a witness from the trial. He should have put her on as a hostile Defense witness. Clearly, with his demonstrated skill at cross-examination he would have revealed many exculpatory facts from her testimony under oath. Only-if he had he prepared. However, he was not prepared. He did not put her on the stand. His failure to do so prejudiced the trial. The outcome of the proceedings would have been, in all probability different.

(....6) Claim not frivolous

The Respondent argues that “On that basis alone (“Petitioners expression of pride” in one element of Counsel’s performance), the Court should dismiss this particular claim of ineffective assistance as frivolous.”¹⁹³ Trial Court has already certified the petitioner to proceed *in forma pauperis*¹⁹⁴ which also carries a certification of good faith and ‘non frivolity’. As there are factual allegations, and an arguable basis¹⁹⁵ the claim may not be dismissed as frivolous.

(....7) Rubinstein did not go far enough to confront “Junk Auditor” in time for Jury Deliberations

The Respondent asserts that the Government had to spend a significant portion of its summation re-explaining “Riley’s” GX110.¹⁹⁶ This is a disingenuous and misleading re-interpretation of what happened on the summation transcript. The Government had to retreat

was creating a new general ledger or a new ledger system or journal entry system for CASI at the time I was there”)

¹⁹⁰ Trial Transcript at 475 Line 7 (“She clearly relied upon other people’s work to determine the cost. It’s hard to believe that someone could be an auditor and not reconcile bank accounts that probably had less than 500 checks ...”)

¹⁹¹ DECLARATION OF DEBORAH A. DUNLEVY . Docket 08 Civ. 10223 (NRB) Document 32 Filed 08/23/10 at AA 001 A (“Riley, took as gospel, bad numbers and did nothing to correct them.”)

¹⁹² DECLARATION OF DEBORAH A. DUNLEVY . Docket 08 Civ. 10223 (NRB) Document 32 Filed 08/23/10 HABAC 500 to HABAC 593 (“Questions about Audit” Analysis of Hayes Payroll Errors uncaught by Riley. Man of these errors propagated into Riley’s audit. The pattern of errors is evidence of Riley copying.)

¹⁹³ R. Br. at 16, quoting from Karron Brief at 65.

¹⁹⁴ 28 U.S.C. §1915

¹⁹⁵ Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989) (a complaint filed *in forma pauperis* is not automatically frivolous within the meaning of §1915(d) because it fails to state a claim.)

¹⁹⁶ R. Br. at 16 citing Trial Transcript at 1262-65 and Trial Transcript at 788-809

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from GX114. In Kwok's summation he tried to re-represent GX110 as an analysis. It was not; it a listing by payees without classification; a basic accounting function. Kwok was babbling somewhat incoherently at the Jury from 1262 for the 3 pages cited; The Judge had enough problems with Jurors almost passing out¹⁹⁷. Kwok went on and on conflating and confusing audit terms. Most vapidly, he started reciting entries from GX110.

Rubinstein should have punctured the big lie that is GX114. That would have changed the Jury Verdict¹⁹⁸. But he did not. Instead, the Trial Judge had to do it after months after the Jury verdict, in the sentencing phase, when he had to deal with calculating a loss quantity and try to make some real sense of GX114 and GX110. He could not and he said so. Judge Patterson astutely saw partially through the "Junk Audit" when it was too late. The Prosecution again tried to smoke the Judge but wisely, the Judge would have none of it.¹⁹⁹

(.2) [Respondent Argument II] Brady Violations

(...5) The "Procedural Default" Doctrine

If a section 2255 movant could have raised a claim at trial or on direct appeal but did not, §2255 relief on that claim may be barred by the "Procedural Default" Doctrine²⁰⁰. A "§2255 petition may not be used as a substitute for direct appeal".²⁰¹ A claim is "procedurally defaulted" if it is the type of claim that "can be fully and completely addressed on direct review based on the record created" in the trial court, but was not raised on direct appeal.²⁰² "In order to raise a claim that could have been raised on direct appeal, a §2255 petitioner must show cause for failing to raise the claim at the appropriate time and prejudice from the alleged error."²⁰³ "[F]ailure to raise a claim on direct appeal is itself a default of normal appellate procedure, which a defendant can overcome only by showing cause and prejudice."²⁰⁴ These claims are waived unless the petitioner can show actual innocence or show cause excusing the procedural

¹⁹⁷ Trial Transcript at 811 Line 25 ("This is terrible. Juror 3 has got her eyes[sic, this must be because the court reporter was snoozing as well] awake all the time, but I keep an eye on her because she lies back in that chair")

¹⁹⁸ Trial Transcript at 1270ff Line 24 (The Jury recalled GX114 during its deliberations.)

¹⁹⁹ Sentencing 1 Transcript at 1-10, quoted in small parts all over this brief. Now have a look at the beginning 10 pages.

²⁰⁰ *United States v. Frady*, 456 U.S. 152, 168, 102 S. Ct. 1584, 1594, 71 L.Ed.2d 816 (1982)

²⁰¹ *Marone v. United States*, 10 F.3d 65, 67 (2d Cir.1993) (citing *United States v. Frady*, 456 U.S. 152, 165 (1982)).

²⁰² *Bousley v. U. S.*, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611, 140 L.Ed.2d 828 (1998)

²⁰³ *Yick Man Mui v. United States*, 614 F.3d 50, 54 (2d Cir. 2010);

²⁰⁴ *Campino v. United States*, 968 F.2d 187, 190 (2d Cir.1992)

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default, and then actual prejudice resulting from the error²⁰⁵ Finally, demonstrating “fundamental miscarriage of justice” can overcome all.²⁰⁶ An issue that was raised and decided on direct appeal bars defendant from raising it again in a §2255 motion, absent extraordinary circumstances, such as an intervening change in the law or newly discovered evidence.²⁰⁷

These hurdles are intentionally high ones to surmount, as the Supreme Court has concluded that respect for the finality of judgments demands that “a collateral challenge may not do service for an appeal,” except in exceptional circumstances²⁰⁸

(...8) Procedural default doctrine does not apply to Brady claims

The procedural default doctrine applies only to claims that could have been raised at trial or on direct appeal. **It does not apply to claims cannot be raised in a direct appeal and that require development of facts outside the trial record**²⁰⁹. The procedural default doctrine never bars a claim of ineffective assistance of counsel raised in a §2255 proceeding, even if that claim could have been, but was not, raised on direct appeal²¹⁰.

(...6) The Petitioners Brady claims are not Procedurally Defaulted

The Petitioners Brady claims are not Procedurally Defaulted for two reasons. First, because no Brady claims were raised during the trial, they were not preserved by Defense Counsel at the trial for direct appeal.²¹¹ Second, because the record on direct appeal is sealed, and because Brady claims by their very nature would enlarge the trial record, they are not generally raised in direct appeal. The appropriate venue to raise Brady Claims is in a 2255 Collateral Attack because Rule 7²¹² deals with Expanding the Record.

²⁰⁵ United States v. Frady, 456 U.S. 102 S. Ct. 1584, 1594, 71 L.Ed.2d 816 (1982) at 152, 168.

²⁰⁶ Murray v. Carrier, 477 U.S. 478, 495-96, 106 S. Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)

²⁰⁷ Davis v. United States, 417 U.S. 333 (1974)

²⁰⁸ United States v. Frady, 456 U.S. 102 S. Ct. (1982) at 1593-94 at 165, 167-68,

²⁰⁹ Bousley v. U.S., 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)

²¹⁰ Massaro v. United States, 538 U.S. 500, 503-04, 123 S. Ct. 1690, 1693, 155 L.Ed.2d 714 (2003)

²¹¹ To verify this scan of the entire corpus the trial transcript does not reveal the use of the word “Brady” or synonyms, cognates or related phrases.

²¹² RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (EFFECTIVE FEBRUARY 1, 1977, AS AMENDED TO FEBRUARY 1, 2010)

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(...7) Direct Evidence of Brady Material

(....9) Brady Claim Elements

A Brady claim has three elements: (1) Prosecution suppressed evidence; (2) Evidence suppressed was favorable exculpatory; (3) evidence suppressed was material. The Prosecutor's failure to notify defense counsel of material exculpatory evidence and arguing false evidence to the jury was misconduct serious enough to warrant the granting of a writ of *habeas corpus*.²¹³

(....10) Snowden testified she had more draft budget forms and correspondence

That Snowden admitted destroying budget forms and withholding correspondence. This must now be examined to determine because there is a reasonable possibility that this material was exculpatory or impeaching evidence that would have had the potential to affect the outcome of the trial.

(....1) Government Knowledge Defense obviates Criminality.

If Snowden was negotiating with CASI/Karron to grant the allowances for utilities and power, evidence would exist in the draft and interim budget forms and correspondence²¹⁴. In many areas of white collar crime, fraud or criminality cannot exist if the government knows about the situation and is actively working to resolve it; this is the so called "Government Knowledge Defense"²¹⁵. This theory is supported by these pieces of evidence provided by Snowden herself at trial.

(....2) Elements of Theory of Snowden sourced Brady Material

1) Snowden was calling CASI "a lot"^{216 217}

²¹³ Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991)

²¹⁴ U.S. ex rel. Ubl v. IIF Data Solutions, 2011 WL 1474783 (4th Cir. April 19, 2011) (if the government with full knowledge of the relevant facts directed a contractor to file a claim that was later challenged as false, the fact that the contractor did what the government told it to do would go a long way towards establishing that the contractor did not knowingly file a claim known to be false.)

²¹⁵ DAVIDSON, M. J. (2009) THE GOVERNMENT KNOWLEDGE DEFENSE TO THE CIVIL FALSE CLAIMS ACT45 Idaho L. Rev. 41 2008-2009

²¹⁶ Trial Transcript at 419 Line 20: Snowden - cross A. Probably verbal. They were probably -- the -- what I usually do if there is a budget that comes in that's wrong, I'll just give the company a call and say, your numbers are wrong, please revise and resend your document.

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2) CASI/Karron/Gurfein was calling Snowden a lot²¹⁸

- a. The topic of conversation could not always be “no”. To support so much apparent conversation the topic must have been something else. It seems reasonable that they were negotiating.²¹⁹
- b. The negotiations were moving forward and successful to some degree because of the auditor allowances must have depended on the negotiations.
 - i. The OIG came in late 2002 or early 2003 in secret²²⁰. The OIG must have halted the documents in the approval process for a new budget²²¹ The OIG must have suppressed evidence of the approvals in the approval pipeline process. The OIG halted ATP process again, with their letter halting of Audit Resolution.²²²
 - ii. The approvals had already been forwarded somewhere the OIG missed and managed to get to auditor who used them in her analysis.
 - iii. The approvals were forwarded to CASI/Karron and scanned and lost, removed from the computers, or never forwarded.

²¹⁷ Trial Transcript at XX Line 10: Snowden - cross Q. And you say you made a note, you wrote something down in a file about it? A. Yes. Q. How many calls did you make? A. Quite a few.

²¹⁸ Trial Transcript at XX Line 10: Snowden - direct **Error! Bookmark not defined.** Q. And about how many times were you contacted about this? [Rent and Utilities] A. Numerous times. Between Lee and Dr. Karron, they would tag taking team. They would both call me and ask the same questions like a day apart, and they would consistently get the same exact answer. Q. What answer was that? A. They were unallowable costs and, no, you can not use federal funds.

²¹⁹ Trial Transcript at 850 Line 9: Spring – direct Q. Would you please read that second paragraph, the defendant's response? A. Right. This is from the defendant. You and she need to keep grinding away on disallowed items. Power, Jill Feldman, Solomon and Bernstein, Peter Berger, et cetera, et cetera, et cetera, are all actually and partly allowable. Rent, some cable, some telephone are not yet allowed. I may get an allowance on rental of the living room to the project, as it is clearly completely taken over by the project. Q. Say again what's the date of that e-mail was? A. November 30th, 2002.

²²⁰ Trial Transcript at 810 Line 16: Riley – cross RUBINSTEIN: Q. You told us that they're the ones that should have the final say-so of what's allowable and what's not allowable in a grant, right? A. Correct. Q. And what happened here is that the special agents jumped in on this back in 2003, right? KWOK: Objection. COURT: Objection sustained. Q. And they made this from a civil matter into a criminal matter, correct?

²²¹ Trial Transcript at 811 Line 3: Riley – cross Q. Well, is the audit resolution a civil procedure? A. It's just a procedure. Q. Yeah, where you sit down with the grant officers and discuss whether or not certain expenses are allowed or allowable or not? A. Correct. Q. That never happened here, right? A. Sorry. What? Q. It never happened here? COURT: He says that never happened. WITNESS: Correct. COURT: You never sat down with him?

...RUBINSTEIN: I retire. I'm finished.

²²² Exhibit B

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If Karron and Snowden were indeed negotiating resolution of budget disputes, any correspondence between Karron and Snowden that would tend to impeach her “naysaying” testimony must be brought forward or if destroyed, the Court must consider adverse inference.

Because Snowden was a witness, any material, inculpatory or exculpatory must be given to the Defense prior to Snowden’s testimony, so called §3500 material²²³. Because there was already one instance of government violation, and an unnoticed second Brady violation, we have reason to believe that the Prosecution or the OIG suppressed more documents.

(...8) Indirect Evidence of Brady Material

Indirect evidence of material exculpatory documents not brought to trial was brought out above. Logic demands that where the numbers reveal allowances, there must be supporting documentation. To win a new 2255 hearing, we only need to show one strong instance of Brady Material we have reason to believe exists,

(.3) [Respondent Argument III] Actual Innocence

The Petitioner makes reasonable argument that material evidence exists that shows misappropriation, in fact, did not occur using government funds: Because of that evidence, the Petitioner would be Actually Innocent.²²⁴ A hearing must be held to evaluate this factual allegation; because if true, would entitle the Petitioner to relief.

This is not a freestanding claim for *habeas* relief. This is as a direct result of the Constitutional Violations that occurred at trial, namely, Ineffective Assistance of Counsel, and attendant Failure to Confront the Petitioners true accuser, the former CASI accountant and hostile auditor Hayes. Finally, it should be impossible to convict an Actually Innocent defendant if key exculpatory evidence was withheld. Evidence of but a few withheld exculpatory fragments are presented here. Goldberg swears, his exculpatory Affidavit was completely ignored by the Prosecution, and Snowden admits under oath to withholding and destroying budget documents.

²²³ The Jencks Act, 18 U.S.C. §3500. See Trial Transcript Page 454 and 496ff

²²⁴ Karron Brief at 70

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(...9) Four Counter Arguments

1) The Rent was reclassified as salary, as evidenced by the new forensic analysis of GX114. As such, no federal funds were used to pay Rent.^{225 226}

2) Karron (over)funded the project²²⁷ by sufficient margins²²⁸ to cover direct costs even if the above Rent (1) is not included²²⁹. As such, no Federal funds to pay Budget Line J, Program Indirect Costs or CASI general costs (Rent).

3) Government Knowledge (ATP Management) of the situation²³⁰ and their effort with Karron to find a legal solution²³¹ (such as reclassifying rent, *above*) obviates the criminal “intentionally misapplies”²³² clause. This is true if there was reasonable expectation of resolution by both parties.²³³

4) The Petitioner was not out of budget with a permissible budget tolerance of \$422,900. Over budget (and the converse necessary under budget²³⁴) line items, otherwise legitimate direct

²²⁵ Karron Brief Exhibit 1, Dunlevy Declaration, at 10, “RENT”. Exhibit D, Dunlevy Lead Sheets AA001A, AA2, AA6, and *etc*

²²⁶ Karron Brief at 26 “6. Rent was reclassified as Salary”

²²⁷ Co-funding direct costs (Budget Line J) and funded the overhead, (Budget Line K), Federal funds were not used for Budget Line K, Karron Funds were used for Budget Line J; this is what tracing of funds would have revealed at trial except for Rubinstein’s Ineffective Assistance of Counsel in failing to engage forensics support..

²²⁸ Misappropriation greater than \$5,000 (18 U.S.C. §666(a)(1)(A)(i)) required for conviction under 18 U.S.C. §666(a)(1)(A).

²²⁹ Exhibit D: Dunlevy Forensic Reconstruction; this is made without accounting for the Rent classification issue.

²³⁰ Bootstrap Payroll Loan, Rent, Reclassification into new budget.

²³¹ Trial Transcript at 128 Line XX: Lide – direct, “Livable Budget” Trial Transcript at 387 Line 1: Snowden – cross “Initial Bootstrap Loans Paid Back”

²³² 18 U.S.C. §666(a)(1)(A)

²³³ Government knowledge can defeat a False Claims Act action, see Collateral Civil Attack 08-CV-10223 (NRB). See U.S. ex rel. Lamers v. City of Green Bay, 998 F.Supp. 971 (E.D. Wis., 1998), *aff’d* 168 F.3d 1013 (C.A.7 (Wis.), 1999), (“Since the crux of an FCA violation is intentionally deceiving the government, no violation exists where the government has not been deceived.”), U.S. ex rel. Durcholz v. FKW Inc., 189 F.3d 542, 545 (7th Cir. 1999) (“no [False Claims Act] violation exists where the government has not been deceived.”)

²³⁴ It is a ‘zero sum game’, The total amount always remains the same. Amounts moved by spending on one side necessary removes it by reducing that amount from somewhere else in the closed system. \$178,764. of Karrons’ gross tax paid wages/salary of \$334,004.12 was turned back into the project. This increased the total amount of funding in the total actual budget to \$1,524,264. See Exhibit D, Dunlevy, Lead Sheets. That portion of salary turned back to cover Co-funding direct costs (Budget Line J) and funded the overhead, (Budget Line K). Overspending in Equipment (D), inclusive or exclusive of site preparation, necessary reduced spending in other categories. See GX62 Appendix III, Spitz Exhibit 1 Schedule Note “(B)

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costs, approved or otherwise²³⁵, in the first year²³⁶ can be compensated in following years as long as they are paid over the life of the award.^{237 238} Because the project was suspended^{239 240} and not terminated²⁴¹, with an expectation of resumption on resolution of budget issues, any out of budget but otherwise legitimate direct expenses²⁴² could have and can be properly resolved without implicating criminality, such as designating CASI a “high risk” grantee.²⁴³

All of this begs the questions: Why did the government stop cooperating with Karron in the negotiation of the end of first year budget revision? ²⁴⁴At this point, only a new hearing can find the underlying cause of this.

(...10) Evidence is irrefutable

The type of evidence presented about GX114 is irrefutable. The prosecution cannot show how²⁴⁵ all (or any) the figures used in GX114 were derived from GX110.²⁴⁶ The Judge Patterson recognized this fact despite the fact that one of the prosecutors tried to talk the Judge out of it with an obvious “snow job”.²⁴⁷ The same “snow job” used on the Jury. The analysis of the

²³⁵ Trial Transcript at 446 Line 17: Snowden - redirect COURT: The issue is whether or not they properly come within that framework of Exhibit D; it's just that they were not approved. Is that right? EVERDELL Correct, your Honor. COURT: That's what I want to find out. [The further testimony meandered off this topic and the courts questions was not directly answered]

²³⁶ Trial Transcript at 348 Line 16: Snowden - Cross Q. If the grantee doesn't spend the 800,000 in the first year, what happens to the money? A. If he doesn't spend all of the \$800,000, he can request a revised budget. His first year will have the actual amounts, and the out years which will be year two and three. He can incorporate the money that was unspent into years two and three.

²³⁷ GX3 “DOC, STANDARD TERMS AND CONDITIONS” (10 1998), .03 Federal and Non-Federal Sharing (b) b.

²³⁸ Trial Transcript at 407 Line 15: Snowden – cross

²³⁹ See Exhibit B, Browning Letter from ATP of November 5, 2007.

²⁴⁰ 15 C.F.R. §A (1–1–01 Edition) §24.3 Definitions. Suspension.

²⁴¹ 15 C.F.R. §A (1–1–01 Edition) §24.3 Definitions. Termination.

²⁴² Sentencing 1 Transcript at 18 Line 12: (“Direct expenses are allowed, regardless of what they are. Indirect expenses are not allowed.”)

²⁴³ 15 C.F.R. §A (1–1–01 Edition) §24.12 Special grant or subgrant conditions for “high-risk” grantees.

²⁴⁴ Trial Transcript at 455 Line 18: Snowden was furiously calling CASI about ‘math problems’ well into the 5th and 6th quarter of the project (Winter 2002-2003)

²⁴⁵ It is impossible to reverse engineer all of the figures in GX114 back as sums of figures in GX110. The Petitioner has written computer code to attempt to recreate 114 from every possible combination of every number in GX110 to regenerate the sums in GX114. The petitioner or any reasonable person who studies this problem, must conclude that GX114 contains significant elements of numerical fiction. Karron’s salary has some foundation in GX110, and then it is insufficient unless the rent checks are included.

²⁴⁶ In engineering school, we try to teach students to show all work so we all can understand what a did, how they did it, and why. See “Riley must have created contemporaneous documents” *above*

²⁴⁷ Sentencing 1 Transcript at 6 Line 3 (“[COURT] Show me. She has no tabulation putting [Exhibit] 114 into context with her [...] Exhibit 110. [KWOK]: If your Honor could look at Government Exhibit 110. [...] [COURT] I

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forensic accounting of CASI's expenditures that Karron sets forth in her memorandum is extremely clear. Judge Patterson will not be fooled again. Dunlevys' forensic reconstruction is designed to enable another competent forensic accountant to reconstruct every step Dunlevy took to arrive at her key figures²⁴⁸, The evidence sufficient to convince every rational juror.

The Petitioner presents the type of evidence that would convince "each and every rational juror"²⁴⁹ that the Petitioner is innocent of the crime of conviction. The petitioner has put forth an obviously superior analysis of the CASI and Karron expenditures that stands up to more than cursory examination, unlike the Governments so called "analyses". The comparison of the two analysis, and the methods used by the two auditors, so clearly discredits the Government's own analysis that no rational juror considering both analyses could have convicted Karron.

(.4) [Respondent Argument IV] Dismissal would be an abuse of judicial discretion and a hearing should be granted.

When the petitioners' §2255 allegations raise an issue(one or even more) of material fact, the Court is required to hold an evidentiary hearing in order to make findings of fact and conclusions of law²⁵⁰.Rule 6 under §2255 Proceeding (*above*) provide that, "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure."

The Supreme Court has said that:

[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.²⁵¹

did look at Exhibit 110.[...] I'm fully familiar with it. [...] That's loan and loan repay. That's not salary [...] I understand. It's just not salary. [KWOK] If I can just correct a misimpression, Government Exhibit 114[GX114] is not a rough calculation. It's not a guess. It's based entirely on Government Exhibit 110 which, In turn, is based entirely on the bank records that she reviewed. [COURT] **They are certainly not in those records, [...]**[emphasis added]

²⁴⁸ Government Auditing Standards July 2007 Revision GAO-07-731G AICPA GAGAS auditors should prepare documentation that enables an experienced auditor having no previous connection to the audit to understand ... [the results].

²⁴⁹ R. Br at 26

²⁵⁰ Walker v. Johnson, 312 U.S. 275, 285 (1941); United States v. Costanzo, 625 F.2d 465, 468 3d Cir. (1980)

²⁵¹ Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (ellipsis in original; quoting Harris v. Nelson, 394 U.S. 286, 300 (1969))(emphasis added).

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Thus, the district court abuses its discretion if it fails to hold an evidentiary hearing when the files and records of the case are inconclusive as to whether the movant is entitled to relief²⁵².

If [the] petition allege[s] any facts warranting relief under §2255 that are not clearly resolved by the record, the District Court [is] obligated to follow the statutory mandate to hold an evidentiary hearing.

The Fifth Circuit has warned that,

While the district court generally has discretion to grant or deny discovery requests under Rule 6, a court's blanket denial of discovery is an abuse of discretion if discovery is 'indispensable to a fair, rounded, development of the material facts.'²⁵³

In exercising the discretion of whether to grant such a hearing, the court must accept the truth of the factual allegations^{254 255}.

When a motion is made under 28 U.S.C. §2255 the question of whether to order a hearing is committed to the sound discretion of the district court. In exercising that discretion **the court must accept the truth of the movant's factual allegations** unless they are clearly frivolous²⁵⁶²⁵⁷ on the basis of the existing record. Further, the court must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief.^{[258]259} [Emphasis Added]

Depositions, in particular, are an important mechanism for such factual development.²⁶⁰ In the *habeas* case of *Hodges v. Epps*, Chief Judge Michael Mills allowed the petitioner to conduct four depositions.²⁶¹

²⁵² [Id. at 131, 134 original citation removed to below]

²⁵³ East v. Scott, 55 F.3d 996 (C.A.5 (Tex.), 1995), *Hodges v. Epp* (1995) (quoting *Coleman v. Zant*, 708 F.2d 541, 547 11th Cir. (1983) (quoting *Townsend v. Sain*, 372 U.S. 293, 322 (1963))(emphasis added)

²⁵⁴ *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1980)

²⁵⁵ See the "Testimony of a Dozen Bishops vs. One Known Liar" standard from Summary Judgment Decision Standards.

²⁵⁶ Frivolous litigation is the practice of starting or carrying on law suits that, due to their lack of legal merit, have little to no chance of being won. The term does not include cases that may be lost due to other matters not related to legal merit. In legal usage "frivolous litigation" consists of a claim or defense that is presented where the party (or the party's legal counsel) had reason to know that the claim or defense was manifestly insufficient or futile. The fact that a claim is lost does not imply that it was frivolous.

²⁵⁷ *Washington v. Alaimo* 934 F. Supp. 1395 (S.D. Ga. 1996) contained 75 frivolous "motions", all of which required the attention of the Court.

²⁵⁸ *Government of the Virgin Islands v. Bradshaw*, 726 F.2d 115, 117 (3d Cir.), cert. denied, 469 U.S. 829, 105 S.Ct. 113, 83 L.Ed.2d 56 (1984)

²⁵⁹ *ibid*

²⁶⁰ *ibid*

²⁶¹ See Case No. 1:07CV66-MPM, Docket Entry 38, Feb. 1, 2010.

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The court in *Dollar v. Long Mfg* described as “vital” the role of depositions in particular, and holding that it was an abuse of discretion for the court to refuse to compel them²⁶²

(...11) Quality of the Evidence

It is a fact that the numbers in GX114 don’t add up. It is inarguable that GX114 appears at least in part, to be made up²⁶³. Sworn Statements by Dunlevy (Exhibit D) are supported by financial statements already in evidence (GX80 through 90, DXXXX DXXXX-1, DXZ, DXZZZ, DXZZZ-1). Sworn Statement of Goldberg(Exhibit G) re-affirms a prior exculpatory sworn Affidavit withheld by the Prosecution. Sworn trial testimony by Snowden admits to “additional correspondence to these exhibits”²⁶⁴ she withheld from the Prosecution²⁶⁵ and other documents she would routinely “discard”²⁶⁶. Finally, the very authority of ATP program specific practices is contradicted by superior DoC statutes require OMB waiver for specific programs.(above)

(...12) Trial Judge *sua sponte* expressed critical doubts about GX114

Trial Judge Patterson *sua sponte* pointed out unsuitability of the only direct evidence against the defendant, GX114: is “... not something that a Court could rely on in a criminal case”²⁶⁷, “this is a mess”²⁶⁸. Despite this assessment, GX114 was in fact relied upon by the jury to render a conviction.^{269 270 271}, the reliability of the trial verdict²⁷² is in doubt. This satisfies the “Good Cause”²⁷³ standard, a requirement for further factual development. The Petitioner raises plausible claims for *habeas corpus* relief, each raising specific controverted facts supported by copious admitted and admissible evidence (above). These detailed and controverted issues of

²⁶² See generally, *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 615-617 5th Cir., (1977)

²⁶³ Karron Brief at 26, “(28) Analysis of GX114 Errors and their meaning”

²⁶⁴ Trial Transcript at 424 Line 5

²⁶⁵ Trial Transcript at 424 Line 1

²⁶⁶ Trial Transcript at 420 Line 20

²⁶⁷ Trial Transcript at 5 Line 4.

²⁶⁸ Sentencing 1 Transcript at 16 Line 14et seq: COURT: He underspent budget through those fringe benefits by \$4,000 it says right above it. Look at that [GX114]. This is a mess

²⁶⁹ Trial Transcript at 1377 Line 1

²⁷⁰ Trial Transcript at 1371

²⁷¹ Sentencing 1 Transcript at 5 Line 3: It seems to me this is just a rough calculation and not something that a Court could rely on in a criminal case.

²⁷² *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)

²⁷³ *Habeas Corpus* Rule 6. Discovery: 1 (a)

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fact which, if proved at a hearing, would clearly entitle the Petitioner to relief.²⁷⁴ ²⁷⁵ Refusal to grant a hearing in this case in light of the judges own observations on record would be abuse of sound judicial discretion.²⁷⁶ Because of this, a hearing must be granted.

(4) Signature

Signed on this day December 7, 2011

Long Beach, New York



Daniel B. Karron
Petitioner
pro se

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²⁷⁴ Machibroda v. United States, 368 U.S. 487, 494-95 (1962)

²⁷⁵ Newfield v. U.S., 565 F.2d 203 C.A.2 (N.Y.), (1977)

²⁷⁶ Burns v. Thiokol Chemical Corporation, 483 F.2d 300 5th Cir. (1973) (“We are mindful that the scope of discovery lies within the sound discretion of the trial court.”) Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613 C.A.5 (Ga.), (1977) (“However, in his order denying plaintiff’s motion to compel, the trial Judge declined to state any reasons for his order limiting the scope of discovery. We have found no sound reason for the denial of plaintiff’s motion to compel. We thus hold that the trial Judge abused his discretion in denying plaintiff’s motion to compel.”)

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(5) **Appendix**
(6) **AFFIRMATION OF SERVICE**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL B. KARRON

Petitioner,

-V.-

UNITED STATES OF AMERICA

Respondent.

11-civ-1874 (RPP)
07-cr - 541 (RPP)

AFFIRMATION OF
SERVICE

I, D. B. KARRON, declare under penalty of perjury that I have served a copy of the
attached

1. Covering Letter to Judge Patterson
2. "CORRECTED Sur-Reply Memorandum of Fact and Law in support of
Petitioners' 28 U.S.C. §2255 Motion to Vacate Criminal Verdict "
3. Exhibit Appendix for the above, consisting of
 - I. Exhibit B: Browning Letter
 - II. Exhibit E: Eisen
 - III. Exhibit D: Dunlevy
 - IV. Exhibit G: Goldberg
 - V. Exhibit O: Orthwein

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upon

Mr. Christian R. Everdell
Assistant United States Attorney
Terrorism and International Narcotics Unit
Southern District of New York

whose physical address is

One St. Andrews Plaza,
New York, New York, 10007

And a copy by e-mail to
<christian.everdell@usdoj.gov>

A handwritten signature in black ink, appearing to read 'D. B. Karron', with a long, sweeping flourish extending to the right.

D. B. Karron
Petitioner, *pro se*
348 East Fulton Street,
Long Beach, New York 11561
E-Mail to drdbkarron@gmail.com
Facsimile +1 (516) 308 - 1982
Voice +1 (516) 515 - 1474

Dated: Long Beach, New York
2 December 2011

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(7) Exhibits**(.1) Guide to Exhibits**

- ❖ Exhibit B is a letter from Mr. James M. Browning who was the successor Grants Specialist to Ms. Hope Snowden at NIST. The letter is addressed to Peter Ross, who was the last ATP Program manager accepted by the ATP program. In this letter he reveals that the residual funds from the ATP grant were sitting unused and available in the CASI treasury draw account for 4 years waiting to be paid out. The letter solicits CASI to submit invoices for reimbursement of costs. This is evidence that ATP was not so concerned about CASI that it terminated the ATP program and ‘took back’ or returned grant funds encumbered for expected project costs back to the government.
- ❖ Exhibit E is sworn Declaration from Eric Eisen, Esq. in which he certifies his transcription of the last NIST ATP program solicitation meeting in 2007 hosted by then ATP program director Marc Stanley. Mr. Stanley makes a number of comments about how flexible and ‘un-bureaucratic’ his program is. This supports the existence of negotiated waivers for nominally un-allowed and un-allocable costs such as utilities and rent.
- ❖ Exhibit D consists of the excerpted forensic reconstruction ‘lead sheets’ from the voluminous sworn “DECLARATION OF DEBORAH A. DUNLEVY IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT”, docketed under Case 1:08-cv-10223-NRB Document 32. The main point of this document is to provide key figures regarding the total cost of the project, and the sources of funding. This is important because the project costs are **more than** the government funding. The total cost of the project as \$1,524,264²⁷⁷, of which the Federal Share is \$1,345,500 and the CASI co-funding contribution was \$178,764.²⁷⁸
- ❖ Exhibit G consists of the sworn Declaration of Goldberg regarding the investigation by Special Agents of Karron. The Exhibit brings forward an example of Brady Material that

²⁷⁷ Dunlevy Exhibit D at AAC109 Line 18(Lead Sheet 9),

²⁷⁸ Dunlevy ExhibitD Lead Sheet at AA-001-C,

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should have been included by the Prosecution but was not. The circumstances are fully explained by Goldberg in his Declaration narrative.

- ❖ Exhibit O consists of the kickoff meeting agenda and security badge from Karrons' attendance. This kickoff meeting was hammered away at by the Prosecution as where the 'Rules' were laid down for Karron. This meeting was taken as evidence that Karron was fully knowledgeable about these rules and willfully disregarded the rules in how Karron conducted the project. However, the meeting agenda memo shows that this is not the case. The Rent and other issues were on the negotiating table and known by ATP from the very beginning. Orthwein and ATP program management tried to accommodate CASI and Karron's requests and needs.

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(.1) EXHIBIT B BROWNING LETTER

EXHIBIT

B

Karron 2255 Sur-Reply Memorandum of Fact and Law Appendix



UNITED STATES DEPARTMENT OF COMMERCE
National Institute of Standards and Technology
Gaithersburg, Maryland 20899-

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November 05, 2007

Mr. Peter Ross
Computer Aided Surgery, Inc.
300 East 33rd Street, Suite 4N
New York, New York 10016

RE: NIST Cooperative Agreement No.: 70NANB1H3050

Dear Mr. Ross:

The above referenced cooperative agreement ended on September 30, 2004 with a balance in the grant account totaling \$54,500. We want to be sure our records agree with yours before we proceed to deobligate these funds.

If there were additional claims made against the account, please so indicate and we will proceed to deobligate the remaining balance and finalize the closeout of this project.

You may submit the requested information to me via E-mail at the address noted below.

If we do not hear from you by November 30, 2007, we will assume that the information we have is correct and will proceed to deobligate the remaining funds in the grant account.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James M. Browning".

James M. Browning
Grants Specialist
GAMD/DA/CFO/NIST
100 Bureau Drive, MS 1650
Gaithersburg, MD 20899-1650
Phone: 301-975-8088
FAX: 301-840-5976
E-mail: james.browning@nist.gov

C: Heather Mayton
Grant File

NIST

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(.1) EXHIBIT E EISEN DECLARATION

EXHIBIT

E

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- v. -

DANIEL B. KARRON,

Defendant.

08 Civ. 10223 (NRB) (DFE)

DECLARATION OF ERIC A. EISEN,
ESQ. IN RE OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

I, ERIC A. EISEN, ESQ, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury as follows:

1. My name is Eric A. Eisen. I am a principal of the law firm of Eisen & Shapiro, which is located at 10028 Woodhill Road, Bethesda, Maryland 20817.
2. I am admitted to practice law in the District of Columbia and Maryland. I am also admitted to practice in several United States District Courts, Courts of Appeal, and the United States Supreme Court.
3. Dr. Daniel Karron is an acquaintance of a friend of mine from childhood. I first met him shortly before his criminal trial and was asked to provide him help.
4. Dr. Karron had no funds to my knowledge and the last time I had been involved in any criminal matter was over thirty years ago. Based on this I was unable to provide him assistance.
5. Recently Dr. Karron asked me to review for accuracy a transcript he had prepared from a video of what he told me was a presentation made by a government agency and to certify the accuracy of excerpts he had transcribed from that video.
6. As a pro bono action and a service to the court and the administration of justice, I agreed to review the transcript, correct it, and certify the accuracy of the corrected transcript.
7. I was presented with a video and transcript excerpts. For each excerpt, I located the corresponding time in the video, listened to the speakers, and corrected the transcript so that it was as accurate as possible. I did not select the excerpts to be transcribed and I did not listen to

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what was said before and after the excerpts, focusing only on the accuracy of what was transcribed.

8. Because I did not know the names of the speakers, I omitted names, which Dr. Karron had sometimes placed in his draft. Where more than one person on the podium responded to a question, I reflected the multiple responses by putting more than one answer to a question in the order in which the answers were given.

9. The attached transcript is the result of that effort. It contains a total of 11 excerpts, each identified by the time reported on the video of when the excerpt begins. The identifiers, preceded by Dr. Karron's exhibit numbers, are:

- 115. 1:54:00
- 116. 2:02:45
- 117. 2:37:33
- 118. 2:42:26
- 119. 2:45:35
- 120. 21:51:30
- 121. 2:58:30
- 122. 2:59:30
- 123. 3:03:15
- 124. 2:28:27
- 125. 2:31:14

I certify that the attached transcription is accurate and complete as to the material it contains, with no elisions (except immaterial stuttering and the like such as are typically removed from transcripts) in the text produced.

SO SWORN:



August 30, 2009

Eric A. Eisen
Eisen & Shapiro
10028 Woodhill Rd.
Bethesda MD 20817
301-469-8590

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BEGINNING OF EXCERPTS

1:54:00

A: Well, now you're all experts in ATP, hopefully.

We are going to conclude with a few remarks. I'll ask my colleagues to approach the table for the Q and A section. Just to repeat a few comments the competition is currently open, we've announced on April 4, we are accepting proposals, again, in all technology areas, but we're also interested in receiving proposals in the 4 cross cutting areas of national interest, described earlier. Again, Let me repeat, that deadline at 3pm on May 21, is exact; no exceptions.

[...]

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2:02:45

Q: I have two quick questions.

First question is that if you're a single company, and I understand that the limit of the budget is 2 million dollars for three years, does that include the cost sharing that can be up to 30 percent. So...

A: The Federal share is limited to 2 million dollars.

Q: So that if you submit 2 million you can..., that doesn't count the cost sharing; you can add to that. Right? So the total budget is more than 2 million.

A: That's correct.

Q: Thank you.

Second Question. Is that you didn't mention about the fringe benefit could be looked at as direct for those companies in which that is normally counted as direct and not included for those companies that doesn't included include that. Is that in the regulations in the kit?

A: Well we stipulate in the budget that you can charge fringe benefits as a direct cost. However if your company normally charges them as an indirect, you have to leave them as an indirect and if you're a single company you will have to absorb those costs. And when your project is audited, the auditors will be looking to insure that you've charged the cost in the appropriate category.

Q: I see because that's a huge difference in the application. But anyway... it's in the kit that's stated. Thank you.

[...]

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2:28:27

Q: My question has to do with how broad your definition is of 'technology'. Our company works in medical informatics developing classification schemes, thesauri, mapping strategies, and then we subcontract out a lot of the computer work. Would our work qualify for an ATP proposal?

A: It can. We've actually funded a fair amount of in medical informatics. If you go to our web site and look under the funded projects you might see some examples. Basically you need to make it very clear to as to what..., where is the high technical risk and who is working on those high technical risk tasks so that it doesn't look like it is an entire pass through to the subcontractor for all the high technical risk issues. But you need to make the business case and the technical case as to why this is the best way to put a project together.

Ok so it is possible, but I think you have to make the case as to what is the technical risk . And what innovation approach do you have to overcoming those barriers.

Q: And who is assuming the technical risk, primary application and not the subcontractor?

A: Well, I think we like to see that it's not all in one place and not in the other. I think that we do get a little bit concerned if all the high-risk tasks are in the subcontractor and not in the primary awardee. But to be honest, you have to explain why that may be the only way to do this project. You know it really depends on your rationale based on how companies are structured in your business sector and how they construct their businesses, that might be the only way anybody could do it. You need to explain that to us as to why this approach is the best technical way to address the risks and innovation.

And I would encourage you to call one of our information technology folks; is there anyone in the room that could raise their hand that would love to chat with this guy later? Well, call Barbara Cuthill... and Ammet. Ammet is in the back there. So there will be

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some folks who can talk to you about that.

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2:37:33

Q: I have a two part question.

Part 1. If a small company is subcontracting with a university does the company have to cost share other than indirect costs?

A: The University or any subcontractors are allowed to charge indirect costs. It's the prime recipient that is submitting the proposal as a single company that is not allowed to charge indirect costs.

Q: Does the small company have to do cost sharing other than the indirect costs?

A: No. No they do not.
[...]

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2:42:26

Q: With a startup company, we are generally pretty lucky if we can accurately forecast what's going to happen in 96 hours in the future... if a...a sort of a two part question... How detailed does the planning have to be, if we reach a decision point, and we go A-B, or is it A-B-C and then second point is, How flexible is the funding if we end up pursuing some route that we didn't even envision to begin with.

A: OK, basically I would have to say on average, most decisions points in the technical plans, we rarely see people with more than two or three alternative directions. We are looking for where do you think are the highest priority things to go after that are also still consistent with our criteria of high risk and innovation

OK, so. basically what you can't do, or hope to do is, is 'OK we'll get to this decision point, and if it looks like we can't do A, which is the highest risk thing, we'll go right to B, which is product development,' because we'll say, 'Ah no you won't,' because we can't fund product development.

OK, so basically your alternatives that you might be considering in a decision point have to also be meritorious against the scientific and technological criteria.

Sometimes, though, things happen along the way, in a high-risk research project where you say 'You know ...' or something may have happened out in the community, that a new discovery that makes you want to rethink a particular direction or part of your proposal.

If you ever want to make a recommendation for a major technical scope change, depending on how major it is, sometimes companies have requested to suspend the project in order to stop the clock because we don't want your three years to run out while it gets evaluated and then they would send us in a 'This is how we would like to change the technical scope. Depending on how big of a change it is -it could be something that the technical and business project managers can evaluate and decide 'yes' or 'no'- they may decide they want additional peer review from federal technical folks to see if it still makes sense. And in a few cases, though it has happened rarely in ATP's history, sometimes

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we've had a oral review for that particular company on their major technical scope change to see if the SEB would have -if the Source Evaluation Board- would have selected it had it been submitted that way.

Because we want to see that whatever change that you propose is of equivalent or higher merit to the original proposal. So it depends on the scope change -how big it is, how much of a change- but we can accommodate those things, but sometimes it can take a suspension of the award in order to stop the time period and give us time to evaluate it. It's not a negative against you to suspend an award for that because it just stops the clock so you don't lose any of your time.

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2:45:35

A: [STANLEY] I would take one more crack at that. One of the things I pride myself on in this program and with my colleagues is that:

We try not to be too bureaucratic.

We are very supportive of the companies that win awards from us, and you actually have a management team that we assign, as Linda Beth has described.

So to the degree it maintains the true fidelity of the original proposal, in terms of the innovation and the risk, we recognize that, we're not going to give up on you if you can present appropriate evidence. It may have to go through various quick reviews, to make sure that you're not creating a whole new opportunity that we didn't hear of, because that would be unfair for people who have already gone through the process.

But it's not unusual for us to go through that process. It's not unique, and to the extent possible we all are in agreement that this would add strength to it, it's in line with general fidelity with the original proposal we certainly will do all we can with you giving us appropriate information to continue that project along. Because we have obviously determined that it has great value to our country.

And as for your future look in terms of the business plans things of that sort, we also understand, we don't expect you to be a gipsy ball reader either. So you have to indicate to us against the criteria, why and where, and what the commercial pathway is, but we have our own ways of reviewing that and we have ways of clarifying that with you before we make that award. But, we understand some of the things, nobody knows yet. But you should be able to nail some of those things because you know one of the real problems, and I've talked to a lot of VC is... well, is, inventors are wonderful people, particularly in the United States. Entrepreneurs are just wonderful to talk to. But there is a disconnect sometimes between clearly what the technology is going to be and how you are going to penetrate the market. The nuance in this program is we don't support basic science. There's lots of federal programs that do that. What we are interested in is capturing that innovation, defining the risk and the feasibility and the commercialization plan and

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having it getting to the market here, before anyplace else in the world, so we maintain increased US competitiveness and jobs etc. So, that's the gap we play in, and that's what you have to address in that proposal . You can ask very serious hundred thousand foot questions before you submit the proposal. If you don't completely understand what we have talked about today we welcome those opportunities to talk to you . The difference here is we can't write the proposal for you. But you can always ask for points of clarification. And you'll find many people, including the people I've got out in the employees lounge for those who are not staying here, that can highlight on some if the things we've talked about right now.

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2:51:33

Q: Yes please. Our product consists of three components.

One of them is the high risk - technically high risk- component, the other two are there is some risk, but not the same degree. So the first component is necessary [garbled] but not sufficient. I was wondering if, as part of the project, obviously that would be part of the project, would the development of the other two components, and more importantly, the integration of the all three components be fair game for the tasks of the project?

A: Absolutely.

Q: On both questions?

A: Yes.

It's very common for us to see..., that's one reason that a lot of companies do come to ATP, we are looking for the whole risk profile. But we're also looking for projects that where we define risk as not just the point risk but it's also if there's risk associated with that integration where it can fail, that's an element of risk that, you know, for example, maybe your components aren't that compatible with each other right now. Why is that? Why do you hope you can make them compatible So I think that we look at risk as not just by-component; We are looking at the whole profile of risk , of the whole project. So there are often lower risk aspects of a project and higher risk aspects of a project. We want you to identify for us in each task where you think all the risks are, y'know high, medium, and low, something to that regard, because then we can evaluate the profile of the whole project.

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2:58:30

Q: [Unidentified Questioner 3] Yes sir, this is a cost-share question

Would you clarify the use of fringe benefits being part of or not part of your overhead rate.

I don't have my DCAA disclosure in front of me, here but I know that we typically will refer to fringes as part of our overhead but I also know that they are broken out as a separate line item in our disclosure. So how does that work?

A: It depends on how your..., you said you have a DCA ?

Q: Yes.

A: It depends on how they established it. If it is part of your indirect cost pool, you must charge it as an indirect cost and cannot charge it as a direct. We do allow it as a direct, because we do have a lot of small businesses, a lot of startups, who don't have big accounting systems and they are able to charge it as a direct expense.

Q: Thank you.

A: You're welcome. Strange new face.

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2:59:30

Q: I'll try to ask yet again another new question this time.

A: Go ahead.

Q: About past performance: The kit does not specify past performance as part of the evaluation criteria, either past performance with the NIST ATP or with other similar externally funded programs . So I'm wondering, is there in some subtle way, past performance factored into evaluations?

A: Well, in terms of evaluating your qualifications and experience I'd say in that context it does, but to be honest, from a real negative point of view, only if you have been debarred is that going to be a really negative thing overall. We are really just going to look at your experience based on how it relates to this award and do we think that you have the qualifications to perform the work that you're doing . Past federal awards might not have been in this area, so it really wouldn't be an indicator of whether or not you can perform research in this particular area. So we're looking for relevant experience and qualifications that relate to this proposal.

Q: So just as a quick follow up if we do have prior NIST ATP experience but it isn't necessarily relevant to this proposal, there's no need to include that in the write up. Is that what I'm hearing more or less?

A: I would say it's only relevant in terms of you know how to manage projects, you're good at managing, talking to your collaborators, and from that perspective if it's not specifically relevant to the R and D area that you're working on on this particular proposal , but you know we're looking at your business qualifications as well as your technical, so I think it can relate but having had a past ATP award doesn't necessarily mean you're more

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qualified for this award. OK? But you need to really make the case; what are the qualifications. 'cause sometimes we have had companies that have had more than one ATP award and for example a particular company would come to an oral review and they always would bring a particular scientist who is very eloquent in explaining the science and at one point we had to say 'OK, you've really explained it well but are you gonna really be the PI on this project, or as soon as it starts are you gonna be gone?' Alright? The old Bait and Switch on qualified personnel doesn't go over really well, so sometimes just putting a familiar face on a proposal if your intention is to not really have that person on it for the entire time won't go over very well. So we are looking for how are..., what are the best resources that you're allocating qualifications to this project.

Q: Let me do a favor here, in the effort to those who want to stay and talk to Dr. Uttag or want to go on and talk to my business people and some who are just, hungry. I'm going to say the remaining three are the remaining three. But all of us here, up on the table, there's a lot of program managers I see standing up at the back end of the auditorium, we're all going to be sticking around. But I think in order to make sure we cover all the parts we promised I'm going to limit these last three.

[...]

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3:03:15

Q: This question [is] about the personnel that can be involved with the project. Some startups spring out of university research. [Garbled] To what extent can they wear their hats as company personnel and at the same time retain their university affiliation and not be frowned upon on by NIST?

A: It depends on the rules of the university. If the university has no restrictions on employees having their own companies or doing work in other companies, and as long as they are employed by that company as well as the university, there is no problem. But it does depend on the university restrictions.

Q: Okay. So NIST doesn't have to specify how this going to be arranged?

A: Correct.

A: There can't be a conflict of interest between the two relationships so you have to really make sure there is no financial conflict of interest.

Q: So if its ok with the university, its ok with you?

A: It's actually addressed in the kit in more detail so we might want to find the page and it gives you the regulation to look at just to make sure there's no conflict of interest. So, for example if you're the small company and you're the professor and you're gonna come on here and have a company and then you wanna be able to subcontract back to your group that might..., we might ask a few questions cause we want to make sure there's really no conflict of interest, and that might not work out. Ok so it really depends on what your role is and do you want the university to be part of the project as well as your company. That's where it could get a little confusing and the kit actually does have some

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information on that to make sure that you avoid those conflicts of interest. Ok?

A: There are also codes of conduct standards in the federal regulations that I had up on the slides... 14 CFR..., 15 CFR Part 14; you may want to look at those.

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2:31:14

Q: I have two questions concerning budgets.

How much budget justification details are required? Do we have to explain also where we gonna get the money for indirect for small business.

A: You don't have to identify the source of your indirect costs unless you're getting on... on the 1262 page 3, in the middle portion of the page 3, it identifies the cost-sharing, so most of the companies do have it within their own company. But if you're getting it from state funding then you would identify the state.

[...]

END OF EXCERPTS

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(.2) EXHIBIT D DUNLEVY Lead Sheets

EXHIBIT

D

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Overview

AA 001A,B,C	Index & Introduction to Summary of Discrepancies
AA 002	Comparison of Budget, Actual and Hayes Audit
AA 003	DB Karron Gross Salary Discrepancy
AA 004	DB Karron Co-Funding Discrepancy
AA 005	Equipment & In-Kind Contribution Discrepancy
AA 006	Monies to & from DB Karron
AA 007	Monies to DB Karron FYE 9/30/02
AA 008	Monies to DB Karron FPE 12/31/03
AA 009	Monies from DB Karron FYE 9/30/02
AA 010	Monies from DB Karron FPE 12/31/03

These twelve pages summarize the major differences from the audited Hayes numbers and the reconstructed numbers prepared at the end of 2004 and during 2005 (after the time period in question).

There is almost a wonton disregard for reconciliation(s) and pure numeric facts.

There was either no audit done by Hayes, or a very poor quality, extremely shoddy audit as shown by variances in several "key" accounts. In small company audits, there is a concept of related parties - officers, partners, major shareholders. DB Karron was 100% owner of Computer Aided Surgery Inc.; special attention should have been paid to the monies that went to and from Karron for the benefit of CASI.

Riley, as a former IRS agent, should have caught the rent income that was reported on Karron's personal income tax return. Riley, as OIG auditor, should have been well aware of the In Kind Contribution allowed for using previously owned equipment for grant purposes. Riley, took as gospel, bad numbers and did nothing to correct them.

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The areas of sloppiness cover officer's salary, Co-Funding, In-Kind Contribution and Accounts Payable as well as the previously mentioned monies to and from DB Karron.

My declaration is so large because it gives a professional auditor all the information they would need to discern these facts.

Aside from this overview and the index that follows, there are the B & C sections which are the amended quarterly reports, SF 269 A. The D section is the monies to and from DB Karron.

E 1 section shows Co-Funding of over \$78,000.

E 2 section shows all cash transactions. Every penny has been accounted for - by date as well as by payee.

Section F (Balance Sheet) and Section G (Income and Expenses) are the individual General Ledger accounts.

The volume of pages is due to a software constraint.

The software only lets you can print an individual account when printing a period longer than one fiscal year. CASI's fiscal year ended in May, so that this was the only way to show ALL the activity that happened.

Section H covers the corporate American Express credit card, the personal Mastercard (that was used over 50% for business); as well as payroll analysis for the extremely messed-up payroll tax returns.

Section I goes into questions about the audit; specific areas such as payroll, accounts payable, employee benefits. There is a class function of Quickbooks - which allows you to segregate and allocate the various sources and uses of funds.

This section also covers the entity change form a corporation to a LLC which was also professional tax negligence (due to a pre-existing Net Operating Loss on the corporation).

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Section J shows the discrepancies on pages HABAC 617 and HABAC 621. There was Co-Funding of 78,204.28; as opposed to zero that is reflected in both Hayes and Riley reports. This variance, by itself, is over 9.77 % of the grant amount for the first year of \$800,000.

The officer loan accounts, to Karron (A/C 1900) and from Karron (A/C 2900), accurately reflect transfer activity from DB Karron. As an aside, in the second grant year until wrap-up; \$100,560 was co-funded. I am confused - co-funding of \$178,764 versus -0-. I guess it was a rounding error???

Last, but not least, Karron was never afforded the opportunity for an audit resolution. You also could change dollars between categories without prior approval from NIST. The grant went from payroll heavy to technology heavy. Change in category - that's all.

My cursory review of Hayes workpapers and general ledger shows inconsistencies. There is co-funding of 29,500 on the profit & loss; as well as 111,000 as salary advance. Advances are usually shown as other assets - they are not profit & loss items. I also question the allocation of Karron salary. If you have a full-time business manager, Gurfein, your time should only be spent on scientific research. There should be no allocation to administration. Secondly, the government has time sheets for research work. Any night and weekend work could be admin time.

Before the grant started CASI owned equipment of \$73,507. During the grant, hardware and software of \$312,936 was acquired. This is a total of \$388,443. **ALL** of this equipment was seized by the government in June 2007. Government seized equipment that was not theirs. More important than the physical equipment is the **intellectual property, work product & custom software** that Karron and company team developed - this was seized as well.

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	A	B	C	D	E
1	Amended SF 269 A Report of Spending				
2					
3					
4					
5					Per Hayes
6			BUDGET	ACTUAL	Audit Report
7					
8					
9		INCOME	HABAC 592	HABAC 591	HABAC 593
10					
11		Co Funding	36,500.00	78,204.28	0.00
12		NIST ATP	800,000.00	800,000.00	800,000.00
13					
14		Total Funding	836,500.00	878,204.28	800,000.00
15					
16		EXPENSES			
17	A	Payroll	325,000.00	331,789.92	322,537.00
18	B	Benefits	110,500.00	87,927.26	84,669.00
19	C	Travel	20,000.00	15,655.21	18,450.00
20	D	Equipment	110,000.00	312,936.37	223,503.00
21	E	Supplies	11,000.00	7,066.30	15,302.00
22	F	Outside Service	250,000.00	78,228.99	99,129.00
23					
24	G	Other	10,000.00		
25					
26		Dues and Subscriptions			736.00
27		Professional		15,870.00	10,195.00
28		Rent (Error)		2,000.00	
29		Repairs & Maintenance		4,315.52	1,425.00
30		Utilities		10,829.33	13,895.00
31					
32		Total Expenses	836,500.00	866,618.90	789,841.00
33					
34		Excess Funding		11,585.38	
35		Funds Carried to Next Year			10,159.00
36					
37			N LLC N	94.10	
38			NIST ATP	818,729.80	
39			NN Co Funding	47,795.00	
40			Total Expenses	866,618.90	
41					
42			Co Funding	78,204.28	
43			Excess Expenses	(66,618.90)	
44			Excess Funding	11,585.38	

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I met DB Karron in the fall of 2004. I was doing per diem work for Jill Feldman, his current accountant at the time. I proceeded to reconstruct the CASI company records. In doing this reconstruction of records I used source documents. These documents were copies of bank statements and credit cards. There were four company bank accounts and a revolving credit line at Chase Bank, the corporate American Express, and a personal Mastercard that was used at least 50% of the time for business expenses. There was also a small amount of out of pocket cash (petty cash) that was advanced by DB Karron.

One of the major problems in small business accounting is the problem of an owner using the right pocket of personal monies for the left pocket of business monies. And, of course, the opposite of using the left pocket of business monies for right pocket personal expenses. Generally, as long as you, the owner, are owed more money by the corporate entity than you are owing to the corporate entity you have what the tax accountants call "basis" in your company.

In reconstructing these records there are 4 major differences in my actual numbers and the numbers of the Hayes audit. The audit period was 10/01/01 to 9/30/02.

- 1 The actual **Gross Salary** received by DB Karron was \$184,252.72. This salary was comprised of 6 checks and one journal entry. For simplicity, I am listing those items here.

Date	Check No. Payee	Amount
5/11/02	10192 DB Karron	8,333.33
6/3/02	10212 DB Karron	8,333.33
7/5/02	10290 DB Karron	14,583.33
7/5/02	10291 DB Karron	14,583.33
7/5/02	10292 DB Karron	14,583.33
8/2/02	10401 DB Karron	61,918.07
	Sub-Total Checks	122,334.72
9/30/02 AJE	DB Karron	61,918.00
Total Gross Salary Received		184,252.72
Salary per Hayes		175,000.00
Difference		9,252.72

Additional References

HABAC 501 to 506

These 7 numbers were not added up correctly by Hayes, Riley, Kwok as well as any other supervisors that were involved.

DB Karron Gross Salary Discrepancy

AA 003

2 The second difference is the Co-Funding . Hayes audit report shows zero in Co-Funding. I show that \$78, 204.28 was either deposited to CASI bank accounts, or a personal check was used to pay for business expenses, or Mastercard paid for expenses. The Mastercard was paid by DB Karron personally. Here is a summary of expenses that were paid for by DB Karron's funding.

A/C No.	Account Name	Total Co-Funding	CAC 113	BAC 311	HABAC 629 to 631	HABAC 632	CAC 115	HABAC 632
			NCR Exp Reimb	Out of Pocket	Master- Card	In-Kind Equipment	Personal Check to Bank	Personal Check to Vendors
1010	NCR Check	207.51	207.51					
1010	DB Karron Check 5173	3,000.00					3,000.00	
6000	Accounting	500.00						500.00
6010	Auto	301.16		194.15	107.01			
6019	Books	410.67			410.67			
6020	Communications	1.00		1.00				
6040	Computer Installation	689.23			689.23			
6050	Conference	300.00			300.00			
6053	Dues & Subscriptions	91.06			91.06			
6060	Employee Benefits	36,112.55		30.00	18,787.55			17,295.00
6120	Miscellaneous	147.01			147.01			
6130	Office	357.06			357.06			
6175	Postage & Delivery	31.35		31.35				
6178	Repairs	248.10		75.00	173.10			
6330	Research & Development	32,114.25			2,114.25	30,000.00		
6349	Stationery	191.02			191.02			
6370	Travel	3,502.31		1,134.32	2,367.99			
Total		78,204.28	207.51	1,465.82	25,735.95	30,000.00	3,000.00	17,795.00
Total Co-Funding HABAC 602			A/C 4010	A/C 4013	A/C 4014	A/C 4015	A/C 4712	A/C 4912

DB Karron Co-Funding Discrepancy

Hayes Audit Co-Funding	0.00
GX 114 Co-Funding per Riley	0.00
Actual Co-Funding	78,204.28
Materiality Percentage (to 800,000 Grant)	9.78%

Co-Funding of 5 % was met and ignored by 2 auditors - Hayes and Riley

5 % of \$800,000 is \$40,000. \$78,204.28 exceeds \$40,000.

AA 004

KA-281

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- 3 The third difference is the dollars spent on equipment. Again Hayes has \$223,503.00 and the amount in the CASI General Ledger is \$290,143.29. This is a difference of \$66,640.29. Thirty thousand of this difference is due to ignoring the Co-Funding of In-Kind Equipment. Under the Grant Rules you may consider prior owned equipment to be used for grant purposes, no need to buy new equipment if you can use what you already own.

GAAP (Generally Accepted Accounting Principles) uses accrual basis accounting. In this basis there are accounts receivable (owed to the CASI) as well as accounts payable (monies CASI owes to their suppliers). CASI owed Silicon City \$16,532.55 from at least 5/31/02. CASI also owed Silicon Graphics \$30,726.15 from 1/9/02. Since these 2 companies have been suppliers since 1996 to CASI they were not overly concerned about being owed money and being paid later than was customary.

To Recap:

Per Hayes HABAC 593		223,503.00	Audit Report
	Per HABAC 624-626	212,884.59	Cash Paid to Vendors
	Per HABAC 625	16,532.55	A/P Silicon City
	Per HABAC 625	30,726.15	A/P Silicon Graphics
HABAC 607	Total per HABAC 626	260,143.29	A/C 6330
HABAC 607	Per HABAC 627	30,000.00	In Kind
	Per HABAC 581	22,793.08	See Schedule Below
Total costs incurred by CASI HABAC 581		312,936.37	
Difference		89,433.37	

IN KIND Contribution of Equipment was ignored by 2 auditors - Hayes and Riley. Amount of Co-Funding is \$30,000.

Per HABAC 581 Combination Sheet		
HABAC 604	Amex Software	3,294.54
HABAC 604	Amex Tech	349.55
HABAC 604	Amex Tools	387.25
HABAC 603	Amex Computer Installation	3,944.91
HABAC 603	Amex Equipment	10,802.85
HABAC 605	NIST ATP Computer Installation	3,684.23
HABAC 606	NIST ATP Paypal	329.75
		22,793.08

Equipment & In-Kind Contribution Discrepancy

AA 005

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- 4 The fourth difference is the *officers loan accounts*. The monies taken out of CASI, put into CASI, and reclassified to other expenses such as Rent and DB Karron Gross Salary.

The 1900 A/C'S are the monies taken out by DB Karron. These monies should have been considered "net salary" and "grossed-up" to the correct salary amount. Since the initial checks that were taken in October 2001 were not "fixed" until August & September 2002, ten and eleven months after they were taken out this should be considered serious negligence by accountant Hayes.

The 2900 A/C's are the monies put in by DB Karron, as well as the 4000 A/C's that should have been considered as Co-Funding.

One of the major problems in small business accounting is the problem of an owner using the right pocket of personal monies for the left pocket of business monies. And, of course, the opposite of using the left pocket of business monies for right pocket personal expenses. Generally, as long as you, the owner, are owed more money by the corporate entity than you are owing to the corporate entity you have what the tax accountants call "basis" in your company.

The following pages reflect the activity in the respective accounts.

AA 007	Monies to DB Karron FYE 9/30/02
AA 008	Monies to DB Karron FPE 12/31/03
AA 009	Monies from DB Karron FYE 9/30/02
AA 010	Monies from DB Karron FPE 12/31/03

Monies to & from DB Karron

AA 006

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G/L A/C	Type	Date	Number	Name	Memo	Class	Debit	Credit	Balance
1901	Check	10/26/01	2977	DB Karron	Jan 2000	INC	2,000.00		
1901	Check	10/26/01	2978	DB Karron	Feb 2000	INC	2,000.00		
1901	Check	10/26/01	2979	DB Karron	Mar 2000	INC	2,000.00		
1901	Check	10/26/01	2980	DB Karron	Apr 2000	INC	2,000.00		
1901	Check	10/26/01	2981	DB Karron	May 2000	INC	2,000.00		
1901	Check	10/26/01	2982	DB Karron	Jun 2000	INC	2,000.00		
1901	Check	10/26/01	2983	DB Karron	July 2000	INC	2,000.00		
1901	Check	10/26/01	2984	DB Karron	Aug 2000	INC	2,000.00		
1901	Check	10/26/01	2985	DB Karron	Sep 2000	INC	2,000.00		
1901	Check	11/8/01	3040	DB Karron	Oct 2000	INC	2,000.00		
1901	Check	11/8/01	3064	DB Karron	Nov 2000	INC	2,000.00		
1901	AJE	12/31/01	INC	Rcls Rent		RENT		(14,000.00)	
1901	AJE	12/31/01	INC	Rcls Rent		RENT		(8,000.00)	
1901	Check	3/1/02	3142	DB Karron		INC	2,000.00		2,000.00
1902	Check	6/1/01	2901	DB Karron	Draw 2001	INC	1,000.00		1,000.00
1902	Check	10/14/01	2953	DB Karron	Draw 2001	INC	300.00		
1902	Check	10/26/01	2961	DB Karron	Draw 2001	INC	300.00		
1902	Check	10/26/01	2962	DB Karron	Draw 2001	INC	75,000.00		
1902	Check	12/21/01	3103	DB Karron	Draw 2001	INC	500.00		
1902	AJE	12/31/01	INC	Rcls Rent		RENT		(1,000.00)	
1902	AJE	8/2/02	NIST	Rcls Payroll		NIST PR		(30,000.00)	
1902	AJE	9/30/02	NIST	Rcls Payroll		NIST PR		(22,406.08)	
1902	AJE	9/30/02	NIST	Rcls Payroll		NIST PR		(14,928.11)	7,765.81
1903	Check	12/6/01	3093	DB Karron	Mar 2001	INC	2,000.00		
1903	Check	12/6/01	3094	DB Karron	Apr 2001	INC	2,000.00		
1903	Check	12/19/01	3100	DB Karron	Dec 2001	INC	2,000.00		
1903	Check	12/28/01	3107	DB Karron	May 2001	INC	2,000.00		
1903	Check	12/28/01	3108	DB Karron	Jun 2001	INC	2,000.00		
1903	AJE	12/31/01	INC	Rcls Rent		RENT		(10,000.00)	
1903	Check	1/9/02	3115	DB Karron	Jul 2001	INC	2,000.00		
1903	Check	1/9/02	3116	DB Karron	Aug 2001	INC	2,000.00		
1903	Check	1/9/02	3117	DB Karron	Sep 2001	INC	2,000.00		
1903	Check	2/4/02	3129	DB Karron	Oct 2001	INC	2,000.00		
1903	Check	2/4/02	3131	DB Karron	Nov 2001	INC	2,000.00		
1903	AJE	12/31/01		Rcls Rent		RENT		(6,000.00)	4,000.00
1904	Check	2/4/02	3132	DB Karron	question	INC	2,000.00		2,000.00
1905	Check	3/1/02	3144	DB Karron	Draw 2002	INC	1,000.00		
1905	Check	3/1/02	3145	DB Karron	Draw 2002	INC	5,000.00		
1905	Check	3/5/02	3151	DB Karron	Draw 2002	INC	5,000.00		
1905	Check	3/12/02	3153	DB Karron	Draw 2002	INC	4,000.00		
1905	Check	3/22/02	3155	DB Karron	Draw 2002	INC	2,000.00		
1905	Check	3/29/02	3160	DB Karron	Draw 2002	INC	13,000.00		
1905	Check	5/24/02	3184	DB Karron	Draw 2002	INC	2,000.00		
1905	Check	6/25/02	3193	DB Karron	Draw 2002	INC	1,000.00		
1905	Check	9/12/02	10451	DB Karron	Draw 2002	NIST ATP	15,000.00		
1905	Check	9/25/02	10473	DB Karron	Draw 2002	NIST ATP	5,000.00		53,000.00
1906	Check	1/10/02	3122	DB Karron	Jan 2002	INC	2,000.00		
1906	Check	3/1/02	3143	DB Karron	Mar 2002	INC	2,000.00		
1906	Check	3/29/02	3164	DB Karron	Apr 2002	INC	2,000.00		
1906	Check	5/1/02	3175	DB Karron	May 2002	INC	2,000.00		
1906	AJE	5/31/02		Rcls Rent		RENT		(10,000.00)	
1906	Check	6/2/02	3185	DB Karron		INC	2,000.00		
1906	Check	9/12/02	3199	DB Karron		INC	2,000.00		
1906	Check	9/12/02	3200	DB Karron		INC	2,000.00		4,000.00
1908	AJE	7/6/02		Hayes error		AJE		(4,790.02)	
1908	AJE	7/6/02		Hayes error		AJE		(765.24)	
1908	AJE	8/3/02		Hayes error		AJE		(138.66)	
1908	AJE	9/28/02		Hayes error		AJE	3,838.92		
1908	AJE	9/29/02		Hayes error		AJE		(6,320.74)	(8,175.74)
							193,938.92	(128,348.85)	65,590.07
	Summary								
				Opening	6/01/01		1,000.00		
				Checks	Debits		189,100.00		
				Rcls Rent	Credits			(49,000.00)	
				NIST PR	Credits			(67,334.19)	
				Hayes Errors	Debits		3,838.92		
				Hayes Errors	Credits			(12,014.66)	
	Other Reference						193,938.92	(128,348.85)	65,590.07
	HABAC 619								9/30/02
	HABAC 620						Debits	Credits	Balance

Monies to DB Karron FYE 9/30/02

AA 007

AA 008

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G/L A/C	Type	Date	Number	Name	Memo	Class	Personal	Debit	Credit	Balance
2900	Opening	5/31/01								(89,531.00)
2901	AJE	10/1/01		In Kind			30,000.00			
2901	AJE	10/1/01		In Kind				(30,000.00)		0.00
2910	Deposit	6/13/01	DBK 5148			INC		(250.00)		
2910	Deposit	7/2/01	DBK 5150			INC		(1,000.00)		
2910	Deposit	7/13/01				INC		(250.00)		
2910	Deposit	7/23/01	DBK 5158			INC		(400.00)		
2910	Deposit	7/26/01	DBK 5160			INC		(200.00)		
2910	Deposit	7/31/01	DBK 5162			INC		(1,000.00)		
2910	Deposit	8/17/01	DBK 5169			INC		(1,000.00)		
2910	Deposit	8/31/01	DBK 5172			INC		(3,000.00)		
2910	Deposit	9/28/01	DBK 5180			INC		(900.00)		
2910	Deposit	10/11/01	DBK 1006			INC		(2,000.00)		
2910	Deposit	12/4/01	DBK 5189			INC		(5,000.00)		
2910	Deposit	3/21/02	DBK 1052			INC		(1,000.00)		
2910	Deposit	8/13/02	DBK 5168			INC		(20,000.00)		
2910	Deposit	8/16/02	DBK 5185			INC		(1,000.00)		(37,000.00)
2913	AJE	9/30/01	OOP 093001			INC		(156.87)		
2913	AJE	5/31/02	OOP 053102			NIST ATP		(886.18)		
2913	AJE	5/31/02	OOP 053102			NN CO-FUND	886.18			
2913	AJE	8/31/02	OOP 083102			NIST ATP		(485.54)		
2913	AJE	8/31/02	OOP 083102			NN CO-FUND	485.54			
2913	AJE	9/30/02	OOP 093002			N LLC N		(94.10)		
2913	AJE	9/30/02	OOP 093002			NN CO-FUND	94.10			(156.87)
2914	Transfer	6/28/01		From MC				(1,262.75)		
2914	Transfer	7/30/01		From MC				(1,287.16)		
2914	Transfer	8/29/01		From MC				(1,403.27)		
2914	Transfer	9/28/01		From MC				(3,843.61)		
2914	AJE	9/30/01	MC DBK	Personal		DBK	2,589.78			(5,207.01)
2914	Transfer	10/30/01		From MC				(7,566.66)		
2914	Transfer	11/22/01		From MC				(1,975.41)		
2914	Transfer	12/31/01		From MC				(3,222.62)		
2914	AJE	12/31/01	MC DBK	Personal		DBK	5,582.32			
2914	AJE	12/31/01		Co-Funding		NN CO-FUND		7,182.37		(5,207.01)
2914	Transfer	1/29/02		From MC				(3,507.53)		
2914	Transfer	2/28/02		From MC				(1,785.22)		
2914	Transfer	3/28/02		From MC				(3,303.95)		
2914	Transfer	4/26/02		From MC				(3,962.10)		
2914	Transfer	5/29/02		From MC				(1,311.07)		
2914	AJE	5/31/02	MC DBK	Personal		DBK	6,121.40			
2914	AJE	5/31/02		Co-Funding		NN CO-FUND		7,694.40		(5,261.08)
2914	Transfer	6/28/02		From MC				(5,231.64)		
2914	Transfer	7/30/02		From MC				(3,722.58)		
2914	Transfer	8/29/02		From MC				(6,669.95)		
2914	AJE	8/31/02	MC DBK	Personal		DBK	4,664.99			
2914	AJE	8/31/02		Co-Funding		NN CO-FUND		10,859.18		
2914	Transfer	9/30/02		Personal				(5,702.08)		(11,063.16)
							18,958.49	57,201.77	(124,380.29)	(137,751.03)
Summary						Reference	Personal	Debit	Credit	Balance
		5/31/01		Opening						(89,531.00)
				INC A/C1000				(37,000.00)		(37,000.00)
				In Kind				(30,000.00)		
				In Kind			30,000.00			
				OOP				(156.87)		(156.87)
				OOP				(1,465.82)		(57,201.77)
				Co Funding			1,465.82			57,201.77
				Mastercard				(55,757.60)		
				Personal			18,958.49			
				Co Funding			25,735.95			(11,063.16)
							18,958.49	57,201.77	(124,380.29)	(137,751.03)
										9/30/02
Monies from DB Karron FYE 9/30/02										

AA 009

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G/L A/C Type	Date	Number	Name	Memo	Class	Opening Balance	Personal	Debit	Credit	Balance
2900 Opening	10/1/02					(89,531.00)				(89,531.00)
2910 Opening	10/1/02					(37,000.00)				
2910 Deposit	10/4/02	DBK 1129			INC				(5,000.00)	
2910 Deposit	11/14/02	DBK 1142			INC				(5,000.00)	
2910 Deposit	12/4/02	DBK 1152			INC				(2,500.00)	
2910 Deposit	12/10/02	DBK 1153			INC				(2,500.00)	
2910 Deposit	12/12/02	DBK 1154			INC				(2,500.00)	
2910 Deposit	1/23/03				INC				(2,000.00)	
2910 Deposit	3/18/03				INC				(2,000.00)	(58,500.00)
2911 AJE	10/15/03	DBK 1253			LLC				(472.00)	
2911 AJE	12/3/03	DBK 5376			LLC				(2,000.00)	
2911 AJE	12/3/03	DBK 5375			LLC				(1,000.00)	
2911 AJE	12/5/03	DBK 1268			LLC				(2,000.00)	
2911 AJE	12/8/03	DBK 1275			LLC				(500.00)	
2911 AJE	12/17/03	DBK 5379			LLC				(2,500.00)	
2911 AJE	12/17/03	DBK 5380			LLC				(2,500.00)	
2911 AJE	12/31/03	DBK 123103			LLC				(1,050.00)	
2911 AJE	12/31/03	DBK 123103			LLC				(1,000.00)	
2911 AJE	12/31/03	DBK 123103			LLC				(200.00)	
2911 AJE	12/31/03	DBK 123103			LLC				(130.00)	
2911 AJE	12/31/03	DBK 123103			LLC				(2,000.00)	
2911 AJE	12/31/03	DBK 123103			LLC				(200.00)	(15,552.00)
2913 AJE	9/30/01	OOP 093001				(156.87)				
2913 AJE	5/31/02	OOP 053102			N LLC N				(523.52)	
2913 AJE	5/31/02	OOP 053102			N LLC N			523.52		
2913 AJE	8/31/02	OOP 083102			N LLC N				(1,810.48)	
2913 AJE	8/31/02	OOP 083102			N LLC N			1,810.48		
2913 AJE	9/30/02	OOP 093002			LLC				(1,402.64)	(1,559.51)
2913 AJE	9/30/02	OOP 093002								
2914 Opening	10/1/02					(11,063.16)				
2914 Transfer	10/29/02		From MC						(3,857.79)	
2914 Transfer	11/29/02		From MC						(1,197.80)	
2914 Transfer	12/30/02		From MC						(1,379.09)	
2914 AJE	12/31/02	MC DBK	Personal		DBK		8,577.21			
2914 AJE	12/31/02	MC DBK	Co-Funding	NN CO-FUND	DBK			3,559.55		
2914 AJE	1/29/03	MC DBK	Personal		DBK		5,544.86			
2914 Transfer	1/31/03		From MC						(7,404.04)	
2914 AJE	1/31/03		Co-Funding	NN CO-FUND				1,229.00		
2914 Transfer	2/28/03		From MC						(3,305.96)	
2914 AJE	2/28/03	MC DBK	Personal		DBK		388.27			
2914 AJE	2/28/03	MC DBK	Co-Funding	NN CO-FUND				2,484.94		
2914 Transfer	3/31/03		From MC						(4,350.88)	
2914 AJE	3/31/03	MC DBK	Personal		DBK		1,258.55			
2914 AJE	3/31/03	MC DBK	Co-Funding	NN CO-FUND				2,588.06		
2914 Transfer	4/30/03		From MC						(1,772.66)	
2914 AJE	4/30/03	MC DBK	Personal		DBK		727.33			
2914 AJE	4/30/03	MC DBK	Co-Funding	NN CO-FUND				81.50		
2914 Transfer	5/29/03		From MC						(1,674.47)	
2914 AJE	5/30/03	MC DBK	Personal		DBK		1,013.07			
2914 AJE	5/31/03	MC DBK	Co-Funding	NN CO-FUND				261.61		
2914 Transfer	6/28/03		From MC						(1,159.23)	
2914 AJE	6/30/03	MC DBK	Personal		DBK		656.17			
2914 AJE	6/30/03	MC DBK	Co-Funding	NN CO-FUND				81.50		
2914 Transfer	7/29/03		From MC						(1,173.79)	
2914 AJE	7/30/03	MC DBK	Personal		DBK		270.95			
2914 Transfer	8/28/03		From MC						(6,763.55)	
2914 AJE	8/30/03	MC DBK	Personal		DBK		661.45			
2914 Transfer	9/29/03		From MC						(1,568.38)	
2914 AJE	9/30/03	MC DBK	Personal		DBK		868.98			
2914 Transfer	10/29/03		From MC						(2,456.81)	
2914 AJE	10/30/03	MC DBK	Personal		DBK		1,679.31			
2914 Transfer	11/28/03		From MC						(1,536.98)	
2914 AJE	11/30/03	MC DBK	Personal		DBK		373.39			
2914 Transfer	12/30/03		From MC						(2,352.25)	
2914 Transfer	12/30/03	MC DBK	Personal		DBK		1,585.15			(19,117.99)
						(137,751.03)	23,612.69	12,620.16	(82,742.32)	(184,260.50)
Summary					Reference	Balance	Personal	Debit	Credit	Balance
					10/1/02 Opening	(89,531.00)				(89,531.00)
					A/C 2910 INC A/C 1000	(37,000.00)			(21,500.00)	(58,500.00)
					A/C 2911 LLC Post Grant				(15,552.00)	(15,552.00)
					A/C 2913 OOP	(156.87)			(1,402.84)	(1,559.51)
					OOP				(2,334.00)	(12,620.16)
					Co Funding			2,334.00		12,620.16
					Mastercard	(11,063.16)			(41,953.88)	
					Personal		23,612.69			
					Co Funding			10,286.16		(19,117.99)
						(137,751.03)	23,612.69	12,620.16	(82,742.32)	(184,260.50)
Monies from DB Karron FPE 12/31/03										
12/31/03										

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(.3) EXHIBIT G GOLDBERG

EXHIBIT
G

Exhibit G: Goldberg Declaration

Goldberg Declaration

Exhibit G: Goldberg Declaration

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL B. KARRON

Petitioner,

-V.-

UNITED STATES OF AMERICA

Respondent.

11-civ-1874 (RPP)

07-cr - 541 (RPP)

DECLARATION OF
LEE H GOLDBERG

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK:

LEE H. GOLDBERG, pursuant to Title 28, United States Code, Section 1746¹, hereby declares under penalty of perjury the following:

¹ **United States Code § 1746.** Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States:[not applicable here]”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”

THE VISIT BY THE O. I. G. SPECIAL AGENTS

1. On 25 October 2004, I was visited by three well dressed federal Special Agents. I have since come to learn their names were Kirk M. Yamatani and Rachel Garrison, now known as Rachel Ondrik, along with at least one other special agent(s) at my home in 202 Mather Avenue, West Windsor, New Jersey.
2. They arrived around 2:00 and left just before 3:00
3. I noticed that the agents had positioned themselves around my door in a strategic fashion. They were arrayed about my door in a manner that brought to mind tactics that police use when approaching a potentially armed and dangerous situation or subject.
4. Among other things, the two agents furthest from my door appeared to be in a hands-ready stance that would allow them to quickly draw weapons.
5. I noticed the agent's posture because I have several friends and acquaintances within the law enforcement community. In addition, I am a trained first responder and member of the Community Emergency Response Team (CERT) in West Windsor, New Jersey.
6. Due to the aforementioned relationships and the exposure I've had during my activities with CERT, I am somewhat familiar with the hands-ready techniques used by military and law enforcement personnel.
7. While my experience these matters is limited, the agents' stance, with relaxed shoulders and hands placed forward and close to the waist, gave every indication to me that they were in a hands-ready posture and prepared to draw weapons if needed.
8. I do not know if the bulges I thought I saw on their clothing were real or just artifacts of my imagination coupled with my knowledge that active duty federal special agents are usually armed.
9. They identified themselves as Department of Commerce Special Agents who wanted to ask some questions with regard to a criminal investigation of Dan Karron.

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10. I felt there must be a misunderstanding.
11. I thought I could defuse the high tension inherent in having several potentially armed police agents arrayed in an assault formation at my door.
12. I invited the special agent team into my home.
13. I made tea for my guests with the intent of reducing tension and correcting any misunderstandings they held by providing them with whatever information that I could offer.
14. I did this on the assumption that it could help put their concerns about Dr. Karron to rest.
15. My assumption, in retrospect, was wrong.

THE INTERROGATION

16. The agents questioned me at length about my relationship with Dr. Karron.
17. They specifically asked about the nature of my relationship with Dr. Karron's and Dr. Karron's change in gender.
18. At multiple times during the interrogation Mr. Yamatani asked me why I loaned Dr. Karron money.
19. I repeatedly explained that we were friends from Jr. High School and that we had helped each other out many times over the years.
20. They agents seemed unsatisfied with my answer.
21. The agents pressed for more details.
22. I did not feel there that there were any issues to hide.

INAPPROPRIATE QUESTIONS DURING INTERROGATION

23. A question about any possible romantic involvement came from one of the two males (I think it was the non-Asian one) who accompanied Ms. Garrison.
24. He specifically asked me if I'd had any romantic involvement with Karron.
25. The agent asked me if I had sex with Dr. Karron.
26. Ms. Garrison then asked me if I paid to have sex with Dr. Karron.
27. I was surprised and confused at the insinuation of impropriety on my part or Dr. Karrons' part.
28. I did not understand what this line of questioning had to do with their investigation.
29. While I do not recall the exact words, but the male agent specifically implied that, my alleged romantic activities could have been with Dr. Karron in either of his/her two genders.

30. I repeatedly answered to the effect that I had not been involved romantically with Dr. Karron at any time.
31. I found this repeated line of questioning bizarre and unsettling.
32. Their focus on this aspect of the case gave me the impression that they had an untoward interest in Dr. Karrons' sexuality and / or sexual preferences.
33. I did not understand what it had to do with the criminal investigation and asked why they wanted to know this.
34. They said that my loaning you these large sums of money with such loose conditions caused them to wonder how deep our relationship went.

DISSATISFACATION WITH MY ANSWERS

35. At some point after continuing to not accept my answers, Mr. Yamatani (the male Asian agent) asked me if I was paying for sex with Dr. Karron, or if Dr. Karron was paying to have sex with me.
36. I clearly remember Mr. Yamatanis' sarcastic comment:
 - i. "Gee, I sure wish I had a friend like you."
37. The tone and wording of Mr. Yamatani's response clearly indicated to me that he did not believe or like my answer.
38. He then asked if I could be his friend (I do not remember the exact wording).
39. I explained that I only had a few friends I trusted like that and it usually took 10 or 20 years before someone I knew earned that level of trust.
40. In an attempt to further clarify the matter, I explained that over the course of my life I had made a few close and trusted friends and that we helped each other out from time to time in monetary and non-monetary ways.
 - i. In this context, I'd loaned significant sums of money to some members of my inner circle, mostly for the purpose of supporting their businesses.

- ii. I also explained that these loans were almost always repaid in a timely manner.
 - iii. I shared a few stories about how my friends had helped me.
 - iv. I then re-iterated my previously-statement that I loaned money to Dr. Karron to help an old friend launch his business.
41. The other special agents also seemed unsatisfied with that answer.
42. They did not seem to accept my answer that I gave the money to Karron because (then he) asked me, and I believed in him and his business, and that he had paid me back when he was working.
43. It was my impression that they wanted me to admit to reasons (a sexual *quid pro quo*) that I knew were not true.
44. I hand wrote a statement and gave it to them.
45. That affidavit I wrote on that day is attached as Exhibit 1
46. I also gave the agents my records of the loans I made to Karron and Karrons' repayments to me.
47. I re-affirm my statements made in 2004 again in 2011, under penalty of law.

SUBTLE COERCION

48. While the agents did not overtly threaten myself, their tone and choice of words clearly indicated that were and unhappy with my answers.
49. At the conclusion of the interrogation, they asked me to write up an affidavit.
50. They indicated that if I did not submit it, I would probably called to their offices to testify and that there might be other, unspecified consequences.
51. I was uncomfortable in their presence because

- b. they were unhappy with my answers,
- c. asked repeatedly about any romantic involvement with Dr. Karron, and
- d. kept implying that I might be implicated if I did not cooperate.

52. My impression was that they wanted the answers they wanted, not the truth.

MY REQUEST FOR RETURN OF DOCUMENTS

- 53. On November 16, 2004 and after the interrogation, I e-mailed Rachel Garrison (now known as Rachel Ondrik).
- 54. In that e-mail I requested the original documents back and a copy of my affidavit for my records.
- 55. A copy of that e-mail is attached as Exhibit 4
- 56. November 17, I received back my original documents and a copy of my affidavit, attached here as Exhibit 1.
- 57. Soon after the agents departed, I called Dr. Karron informing him of the interview.
- 58. I wrote an e-mail to Dr. Karron memorializing the conversation with the Special Agents and the gender/sexual issues they raised.
- 59. A copy of that email is attached as Exhibit 3.

MY RELATIONSHIP WITH CASI AND DR. KARRON

- 60. Although I never requested it, I was granted a one percentage ownership in CASI.
 - i. At the time, I was told it was an acknowledgement for my support of the company during its inception.

- ii. As my testimony at Dr. Karron's trial indicates, my only involvement with CASI was occasionally reviewing proposals and technical documents and providing occasional technical consultation.
- iii. All this was done on a pro-bono basis much as Dr. Karron had provided me with technical assistance in my own work.
- iv. Although I was a minor shareholder, I never attended any internal business meetings nor was I directly involved in any of CASI's day-to-day operations.

SPECIAL AGENT ONDRIK DECLARATION OMITTS MY EXCULPATORY AFFIDAVIT

- 61. I most recently reviewed a copy of Special Agents Ondrik's Declaration provided to me by Dr. Karron.
- 62. A copy that Declaration which is attached as Exhibit 2.
- 63. My affidavit (Exhibit 1, submitted to Garrison/Ondrik), to the best of my knowledge, was not submitted by the Prosecution to the Karron defense lawyers prior to or at trial.
- 64. I firmly believe that Mr. Rubinstein, Karron's defense counsel, would have asked me questions about the document had he been made aware of my affidavit and made it part of my direct examination as a witness at the trial.
- 65. I was unaware of the Government's obligation to submit any exculpatory evidence in their possession prior to trial and prior calling witnesses during the trial.
- 66. I did testify for the defense at Dr. Karron's trial.
- 67. I do not recall any specific conversation where I talked to Rubenstein about the above OIG agent's visit.
- 68. I do not recall briefing Rubinstein about my old OIG affidavit.
- 69. A copy of my trial testimony is included in Exhibit 5
- 70. Therefore, I must conclude that Rubinstein and the Karron defense were unaware of its existence.

SUPPRESSION AND FUMBLEING OF EXCULPATORY ACCOUNTING

71. I was present at several meetings with Dr. Karron's lawyer Mr. Rubenstein, and Mr. Spitz, Dr. Karron's forensic accountant. Also present was Deborah Dunleavy, Dr. Karron's bookkeeper. During these meetings we compared the accounting evidence being presented by the OIG and the independent forensic compilations prepared by Dunleavy and Spitz.
72. These working sessions and conversations led me to conclude
- v. The accounting facts under discussion clearly proved that that the prosecution's evidence was factually tainted, and
 - vi. that it appeared to have been deliberately misinterpreted by the prosecution.
 - vii. If the misinterpretation was deliberate,
 - a. the only reasonable motivation for deliberate suppression of the fact that almost all of monies received by Karron as salary / rent were used for the NIST grant were actually spent on program activities is prejudice against Dr. Karron.

MY BELIEF IN DR KARRON AND THE PREJUDICE EXHIBITED BY THE GOVERNMENT

73. I have since contributed more than \$15,000 to the Karron defense fund for Mr. Rubinstein and on behalf of Dr. Karron, subsequent to the collapse of the CASI grant and over and above my loans to CASI.
74. This is more than I ever loaned CASI and Dr. Karron.
75. I believe, based on my personal experience with the Department of Commerce Special Agents, that some of the Department of Commerce's motivation for its prosecution of Dr. Karron is because she is a Transsexual, and not because of any wrongdoing on her part.
76. I have personally observed this prejudice in the Special Agents.

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77. This prejudice resulted in
- e. an investigation which produced inaccurate and untruthful evidence
 - f. that was presented at her trial and
 - g. which resulted in the miscarriage of justice that is the conviction of Dr. Karron.
78. The failure of the of the Government to turn over **my** exculpatory evidence at trial is direct evidence of this prejudice.

INEFFECTIVE ASSISTANCE OF MR. RUBINSTEIN as DEFENSE COUNSEL

79. I believe that Dr. Karron's lawyer, Mr. Ron Rubenstein, was insufficiently knowledgeable about the accounting practices and regulatory statutes related to the case and therefore did not provide effective assistance in her defense.
80. In my observations of, and in my many conversations with Mr. Rubinstein, Ron seemed to devote nearly as much energy and concern regarding raising funds and getting paid for his work as for defending Dr. Karron.
81. A significant part of time I spent with Mr. Rubenstein involved discussing various aspects of getting more money from me and Dr. Karron's family.
82. I attended meetings with Mr. Rubinstein and Mr. Spitz and Ms. Dunlevy, for the purpose of obtaining their expert testimony on Karron's handling of her own and the ATP funds.
83. These negotiations broke down because Mr. Rubinstein would not commit to funding these experts.
84. I can only surmise that this was because Mr. Rubinstein was not certain of his own funding from the Karron family.
- a. Mr. Rubinstein was clearly conflicted in his defense of his client, Dr. Karron.
 - b. At that point the government had already seized

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- i. all of Dr. Karron's property and
- ii. the computer equipment which contained all the records relevant to his defense.
- iii. Dr. Karron was broke, unemployed, and without funds.

WHO I AM

- 85. I am an electrical engineer and a technical journalist.
- 86. I have known Dr. Karron since I was in the 9th grade, sometime around 1968, when we went to Sands Point Academy, a small private school on the North Shore of Long Island.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 12, 2011
West Windsor NJ

Lee Goldberg

Digitally signed by Lee Goldberg
DN: cn=Lee Goldberg, o, ou,
email=lgoldberg@green-
electronics.com, c=US
Date: 2011.09.12 19:51:34 -04'00'

Lee H. Goldberg